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First Nations, Métis and Inuit
Health Care

The Crown's Fiduciary Obligation

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Executive Summary

The Supreme Court of Canada's recognition of a fiduciary relationship between the federal government and Aboriginal Peoples established important guiding principles for Crown-Aboriginal relations.¹ The precise "nature and scope of this fiduciary relationship", along with the political, legal and financial implications stemming from the relationship, have been the source of debate among Aboriginal Peoples, the Crown and the courts.² The federal government recognizes the existence of a fiduciary relationship and that fiduciary obligations are owed to Aboriginal Peoples.³ The federal government, however, takes the position that the provision of health services to First Nations and Inuit Peoples is done as a matter of policy only and not because of any fiduciary obligation, or Aboriginal or treaty right.⁴

This paper suggests that Canada acknowledge the legally enforceable fiduciary obligations the Crown owes to Aboriginal Peoples regarding health and health care. Pursuant to these obligations, Canada should review its policies in relation to health services and the resulting differential outcomes of those health services (including provision of and access to those services) and ensure that Aboriginal Peoples are provided with the same level and quality of health care that all Canadians enjoy. Further, Canada must move forward with meaningful consultations with Aboriginal Peoples to carry out its responsibilities.

Introduction

In 1867, when constitutional governance was established and powers were allocated between the federal and provincial governments in Canada, the British Parliament omitted any mention of legislative power over health and health care. As a result, the subject of health does not expressly fall under the ambit of either the federal or provincial governments. As former Supreme Court of Canada Justice Estey opined in *Schneider v. The Queen*:

Health is not a subject specifically dealt with in the Constitution Act either in 1867 or by way of subsequent amendment. It is by the Constitution not assigned either to the federal or provincial legislative authority.⁵

In light of the silence on health in the Constitution, the courts have defined (and continue to define) the constitutional distribution of powers in relation to health. Professor of Law Claude Emanuelli notes that this has resulted in health being the subject of federal-provincial negotiations, as well as being subject to “jurisdictional currents”:

Beginning with the adoption of the Constitutional Law of 1867, the evolution of Canadian constitutional law regarding health suffered the influence of different jurisprudential currents and of the political negotiations between the Federal Government and the provinces.⁶

Emanuelli explains that in 1867 health was considered a private or local matter, the State only intervened in health issues during emergencies (such as epidemics), otherwise health matters were considered regional or municipal concerns. The *Constitution Act, 1867* provided that navy hospitals and the quarantine of vessels fell within the federal sphere of power while jurisdiction over hospitals, asylums, institutions and orphanages as well as “... all Matters of a purely local or private Nature ...” were within the provincial sphere.⁷ Constitutional silence over health and the provision of health care is problematic but takes on heightened concern in the context of Aboriginal Peoples.

Within Canada’s *Constitution Act, 1982*, three distinct categories of Aboriginal Peoples are recognized: Indian, Inuit, and Métis. Section 35 of the *Constitution Act, 1982* states:

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.⁸

Although equally recognized in the *Constitution Act, 1982*, a vast cultural and linguistic diversity exists between and among the three Aboriginal groups.⁹ They all, however, possess Aboriginal rights and share common experiences in their historical treatment by the federal and provincial governments.

Under section 91(24) of the *Constitution Act, 1867*, the federal government has constitutional authority and responsibility for “Indians, and Lands reserved for the Indians.”¹⁰ Judicial interpretation of the Constitution has determined that the Inuit are a federal responsibility.¹¹ The provinces have primary responsibility for health care delivery for Métis¹² and non-status Indians (which is no different than their responsibility to non-Aboriginal Canadians). Since the Yukon, Nunavut and the Northwest Territories are under federal jurisdiction each territory is responsible for delivering health care services to all of their respective residents, including non-Aboriginal people living within their jurisdictions.¹³

Jurisdictional squabbling between the federal and provincial governments has resulted in a complex and convoluted system in the delivery of health care to First Nations and Inuit with an assortment of provincial “hit or miss” under-funded programs for the Métis and non-status Indian population. It is also suggested that the federal responsibility for status Indians and Inuit and the provincial health responsibility for Métis and non-status Indians (acquired either through default or under protest) has caused a fragmented jurisdictional incoherence resulting in a confused patchwork of health care delivery.¹⁴

By examining the legal history of Aboriginal health care in Canada, it is evident that the fiduciary obligation owed by the government to Aboriginal Peoples and respect for both Aboriginal rights (that all groups possess) and treaty rights (that some First Nations people possess) have largely been ignored by the federal government when implementing its health care policies.¹⁵

Legal scholar Leonard Rotman comments that the “... the fiduciary relation – and its concomitant duties, obligations, rights and benefits – is not well understood.”¹⁶ In addition, despite being a key element of the Crown/Aboriginal fiduciary obligations, the duty to consult Aboriginal Peoples has been either ignored or profoundly misinterpreted.

By looking at the relationship between the Crown and Aboriginal Peoples, it is possible to identify certain issues arising from the Crown’s historical treatment toward Aboriginal Peoples in Canada. Certain Crown obligations arise when the basic principles of fiduciary law are applied to the sources of the Crown/Aboriginal relationship. These give rise to more specific

duties, such as the Crown discharging its fiduciary obligation through an adequate and meaningful consultation process.¹⁷ This paper is written in an effort to help clarify the elements of the Crown fiduciary obligations in relation to Aboriginal health and to help simplify what the duty to consult means in light of these obligations.

This second paper in the *Discussion Paper Series* will build upon basic constitutional supremacy elements detailed in the first discussion paper, *Aboriginal Health: A Constitutional Rights Analysis*. Part One provides the historic backdrop to the provision of health services to Aboriginal Peoples. Part Two examines the Crown/Aboriginal fiduciary relationship and the Crown's duty to consult with Aboriginal Peoples. Part Three discusses the disconnect between the government and Aboriginal Peoples which contributes to a poor health status.

1 Historic Background: Provision of Aboriginal Health Services

Following European contact, the health of Aboriginal Peoples declined at a remarkable rate for a number of reasons including the onset of new diseases, loss of traditional lifestyles, change to a nutritionally inadequate rations diet, depletion of food resources, dislocation and confinement to reserve land, and the implementation of the residential school system.¹⁸ It is well acknowledged that Aboriginal Peoples currently experience an overall inferior health status as compared to the non-Aboriginal population.¹⁹

The book, *Medicine That Walks*,²⁰ and the *Report of the Royal Commission on Aboriginal Peoples*²¹ document how the residential school system fostered the spread of disease through inadequate health facilities and how federal government policies resulted in suffering, starvation, disease, and death. Although not exhaustive, the following section will highlight some of the particularly poignant historical points in Aboriginal health that led to the creation of the current federal Aboriginal health policies.

Prior to Confederation, Indian agents, missionaries, traders, and the Hudson's Bay Company provided periodic medical services to Indian people.²² In 1873, the North West Mounted Police (N.W.M.P.) was formed and began providing some services as agents for the Department of Indian Affairs. Besides their role in controlling Indian access to alcohol, N.W.M.P. surgeons provided routine medical services to Indians into the early part of the twentieth century. The N.W.M.P. also played a significant role in the quarantine of groups of Indian people when smallpox, whooping cough, influenza, and tuberculosis swept through the Indian populations.²³

As Canada was colonizing and industrializing, the Indians and Métis Peoples on the western prairies experienced severe hardship.²⁴ Infectious diseases were rampant and the bison herds were rapidly disappearing. Many Aboriginal people were attempting an agricultural way of life for which some provisions were included in the treaties. Aboriginal people negotiated the treaties, accepted the "Queen's hand", and were promised government support to facilitate their transition from hunting bison to farming. Once the bison disappeared, these people were left without the basic necessities of life that the bison once provided. The government, bent on 'discouraging indolence', reluctantly issued rations.²⁵ The Indian agent, acting on behalf of the Crown, sometimes provided rations to Indian bands.²⁶ The rations provided were nutritionally inadequate – consisting mainly of flour, bacon, and a little fresh meat with insufficient nutritional value.²⁷ Dr. Maureen Lux elaborates on the purpose and effects of the rations:

The starvation at Fort Walsh was a cynical and deliberate plan to press the government's advantage and force the Cree from the area to allow the government a free hand in developing the prairies.

The department was well aware of the horrific effects of its policy. The year before, Dr. John Kittson of the NWMP had warned the Indian Department that the rations were inadequate for subsistence. Working from figures he received from prisons and asylums in Europe, Kittson reckoned that a minimum daily ration for a man in moderate health with an active life should be one pound of meat, 0.2 pounds of bread, and 0.25 pounds of fat or butter. State prisoners in Siberia were given more than twice the ration. In severe weather or hard labour, the NWMP minimum daily ration was 1.5 pounds of meat, and 1.25 pounds of bread, plus tea, coffee, sugar; and abundant beans and dried apples. The daily ration for Native people of a half-pound of meat, and half pound of flour was, according to Kittson, 'totally insufficient.' And the consequences were appalling: 'Gaunt men and women with hungry eyes were seen everywhere seeking or begging for a mouthful of food – little children ... fight over the tid-bits. Morning and evening many of them would come to me and beg for the very bones left by the dogs in my yard. When I tell you that the mortality exceeds the birth rate it may help you to realize the amount of suffering and privation existing among them.'²⁸

For those that survived, the transition from a high protein diet to one of limited nutritional value had a devastating impact.²⁹ While some Indian bands managed to succeed in developing agricultural methods, many more succumbed to disease while on a rations diet.³⁰ Any relief measures appeared to be geared towards the protection of the non-Aboriginal population from the diseases that plagued the Aboriginal populations.³¹

Tuberculosis was rampant in the residential schools³² and the epidemics of smallpox, measles and whooping cough decimated Indian, Métis and Inuit people. Given inadequate facilities and treatment for the disease, tuberculosis took its toll on the Indian population. Between 1884 and 1890, Dr. R.G. Ferguson reported a mortality rate of the Qu'Appelle and File Hills Cree at 90 deaths per 1,000.³³ It was not until the early 1900s that the federal government acknowledged something was gravely wrong with the health of Aboriginal people in Canada. In 1904, Dr. Peter Bryce was appointed as General Medical Superintendent of the Department of Indian Affairs.³⁴ In 1906 Bryce issued a report that stated that the "Native people had a death rate more than double that of the general population and in some provinces more than three times."³⁵

In 1922, Dr. Bryce issued a report on the conditions of the residential schools. An excerpt of his publication, *The Story of a National Crime: An Appeal for Justice to the Indians of Canada*, reads:

Regarding the health of the pupils, the report states that 24 per cent, of all the pupils which had been in the schools were known to be dead, while at one school on the File Hills reserve, which gave a complete return, to date *75 per cent were dead at the end of the 16 years since the school opened.* (emphasis added)³⁶

Dr. Bryce's report made recommendations to improve the health of the children in the schools. These recommendations went unheeded by the federal government due to the costs associated with such improvements and church opposition to such reforms.³⁷ Dr. Bryce stated:

The degree and extent of this criminal disregard for the treaty pledges to guard the welfare of the Indian wards of the nation may be gauged from the facts of the widespread devastation being caused by tuberculosis.³⁸

When Bryce retired from his position as Chief Medical Officer in 1921, his position was not staffed for a six-year period. During this time, no efforts were taken to contain the numerous epidemics that were rapidly spreading through the Aboriginal population in Canada.³⁹

In 1924, the Canadian Tuberculosis Society reported that while Aboriginal people comprised 1/22nd of the total population of the province of British Columbia, they accounted for one-quarter of all deaths in the province.⁴⁰ In 1934, the Department of Indian Affairs admitted "it is impossible to admit to a sanatorium more than a very small proportion of Indians who are recommended for such care."⁴¹ In 1937, an editorial appearing in the *Canadian Tuberculosis Association Bulletin* stated:

[T]he facilities for early diagnosis, treatment and prevention that have been used to such good advantage in the White population have never been made available for the attack on the Indian problem.⁴²

At that time, official government procedure demanded that an Indian agent give permission for an Indian to be hospitalized and permission from the head office in Ottawa was a prerequisite for an Indian to be admitted to a tuberculosis sanatorium.⁴³

The high rates of tuberculosis among the Indian population was submitted as proof that "Native people were incapable of making the transition from nomadism to 'civilization.'"⁴⁴ Before tuberculosis was understood to be an infectious disease, the medical profession did little to curtail the spread. The cost involved in treating Indians was clearly a factor informing this inaction as the government claimed it lacked the funds to deal with the situation.⁴⁵ It wasn't until anti-tuberculosis campaigns pressured the Medical Branch that they took any action to curb the disease ravaging the Aboriginal population. Lux explains the problems:

The increasing cultural and professional authority of medicine in the first half of the twentieth century worked to construct Native people as biologically inferior and disease-prone. In the same vein, the anti-tuberculosis campaigns in Canada framed Native people as a disease menace to themselves and others. Although living conditions were often pointed to as a health concern, it was Native people's lack of resisting power that identified them as inferior. From this, it followed that what the people [Aboriginal people] most needed were those inherited qualities that separated the civilized races from the primitive – qualities that were subsumed in Dr. Ferguson's phrase 'white blood'. That prescription for good health, coming from one of the country's leading medical authorities on tuberculosis, lent medical certainty to what the department had always contended: that Native people would only gain the good health enjoyed by non-Native Canadians when they ceased being Native.⁴⁶

While the Indian population was regularly screened for tuberculosis, the Métis population was not. The rate of tuberculosis amongst the Métis, however, was high and remained so until the early 1960s when it was realized that the rate of tuberculosis might not be associated with the biological factor of having "Indian blood" but might be due to socio-economic conditions such as poverty. The 1963 report, *The Métis in Alberta Society*, suggested that the Métis occupied a class position of poverty within the context of the larger Euro-Canadian structure. It further suggested that the solution to the disease problem lay in "extending civilization northward and increasing Métis participation in it."⁴⁷ In other words, if the Métis were civilized like the Euro-Canadian settlers, they would enjoy a health status that was comparable to the Euro-Canadian settlers.

At the end of the nineteenth century, the Métis were living on the borders of the non-Aboriginal and the Indian populations. Many lived in road allowances on the outskirts of towns and others lived outside of the reserves, despite kinship ties to the reserves. The federal government denied the Métis the provision of health services and the provinces only provided services when it was evident that the good health of the non-Aboriginal population was threatened. In 1934, a Royal Commission known as the Ewing Commission, was established in Alberta to examine the "problems of health, education and general welfare of the half-breed population."⁴⁸ The Commission's short report concluded that "... the Commission is of the opinion that while the health situation is serious, it is not, except as to the particular diseases mentioned, more serious than among the white settlers."⁴⁹ The Commission made it clear that the Métis were not to become wards of the state, like the Indians, but did recommend that parcels of land be set-aside for the Métis where hospitals could be constructed⁵⁰ and the services of a traveling physician would be provided.

The Inuit, considered pagans and untreatable in their tents and snow huts, were the last to be provided medical services by the federal government.⁵¹ They were also devastated by the spread of tuberculosis. Waldram, Herring and Young describe the appalling conditions faced by the Inuit:

It was not uncommon for individuals to board the medical or patrol ships for x-rays, and then be refused permission to return to shore when the results positively indicated tuberculosis. They were simply taken away ... The Inuit people were treated like cattle ... To the bulk of the federal staff in Ottawa they were just numbers. But these numbers kept getting mixed up ...

Other patients were not even lucky enough to be returned to their families; in some cases they were dropped off at settlements hundreds of kilometers from home, often with little recollection of their families.⁵²

The Inuit entered the same jurisdictional quagmire that the Métis and Indian people faced. In 1912, for example, Quebec gained the northern territory that contained a large Inuit population. Quebec quickly categorized the Inuit as Indians under the *British North America Act, 1867* (now the *Constitution Act, 1867*) and therefore a federal responsibility under subsection 91(24) of that Act (the provision indicating that Indians are the responsibility of the federal government). Conversely, the federal government saw the Inuit as Quebec citizens. The federal government assumed legal responsibility for the Inuit in 1924 through an amendment to the *Indian Act* that extended medical services to the Eastern Arctic.⁵³ In 1932, the *Indian Act* was amended to delete the Inuit provision.⁵⁴ In the 1939 decision, *Re: Eskimos*,⁵⁵ the Supreme Court of Canada settled the issue and determined that the Inuit were “Indians” under the *British North America Act, 1867* and thus a federal responsibility. This remains the case today.

Following the Second World War, there was an increase in organized medical services available to Inuit and Indian people. The National Health and Welfare Department was formed in 1944, and in 1945 the Indian and Northern Health Service was transferred to it from the Department of Indian Affairs. All other aspects of administration of “Indians, and Lands reserved for the Indians” remained with the Department of Indian Affairs. Indian agents were renamed ‘Superintendents’ and retained control over health by virtue of their designation as Health Officers on reserves – although a different department was now delivering medical services.⁵⁶

By 1956, the National Health and Welfare Department had grown considerably with an increase in staffing and a new \$17 million dollar budget allocation. In 1962, a new branch for Indian and Inuit Health was created – the Medical Services Branch in the Department of Health and

Welfare. Federal government expenditures to Indian health increased and, by the end of the 1960s, the budget was more than \$28 million compared with \$4 million in the 1950s.⁵⁷

The federal government's 1979 *Federal Indian Health Policy* ('Three Pillars Policy') saw an increased involvement of First Nation and Inuit communities in the delivery of health care. The purpose was to remove or reduce the conditions that limited the achievement of community wellness by reaffirming the special trust relationship of the federal government for the health and well-being of First Nations and Inuit people and integrating services to Aboriginal Peoples with the existing Canadian health care system.⁵⁸

Following constitutional reform in 1982, the Medical Services Branch funded a number of demonstration projects in the administrative transfer of health services to First Nations. It created the Health Transfer Initiative to enable Indian bands to design their own health programs, establish services and allocate funds according to community health priorities; strengthen and enhance the accountability of Indian bands to band members; and to ensure the maintenance of public health and safety through adherence to mandatory programs.⁵⁹ In 1989, the federal government approved a health transfer policy framework that gave control of resources for community-based health programs to communities south of the sixtieth parallel.⁶⁰

In 1995, the federal government issued the *Federal Policy Guide – The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Self Government*.⁶¹ Health is enumerated in this policy guide; however it has not received the same attention as have other aspects of self-government – i.e., economic development and band leadership.⁶²

Today, the government department responsible for health services to First Nations and Inuit people is the First Nations and Inuit Health Branch (FNIHB) of Health Canada (formerly called the Medical Services Branch). FNIHB provides primary health care through the Non-insured Health Benefits (NIHB) Program as well as other community-based health programs and services. Their mandate includes:

- ensure the availability of, or access to, health services for First Nations and Inuit communities;
- assist First Nations and Inuit communities address health barriers, disease threats, and attain health levels comparable to other Canadians living in similar locations; and
- build strong partnerships with First Nations and Inuit to improve the health system.⁶³

To summarize, the historic examples in this section have been used to illustrate the foundation upon which current Aboriginal health policies are built. A consideration of early government policies demonstrates that Aboriginal health care was dispersed *ad hoc* and was wholly dependent upon the expansiveness and severity of diseases impacting the non-Aboriginal population. Health policies were geared toward the protection of the good health of the non-Aboriginal population. Jurisdictional conflicts arising over the provision of health care to Aboriginal Peoples have resulted in a disjointed policy framework for Aboriginal health. In an effort to define the current government obligations in relation to Aboriginal health, an examination of fiduciary law, its sources, and the Crown's fiduciary relationship with Aboriginal Peoples follow.

2 Fiduciary Law

Fiduciary law (fiduciary doctrine) traces its origins to the Roman Law period.⁶⁴ This area of law governs relationships between ‘fiduciaries’ and ‘beneficiaries’. In particular, it is concerned with the duties and obligations of the fiduciary and the benefits owing to the beneficiaries of that relationship.⁶⁵

Fiduciary law is a particularly valuable tool for the control and regulation of socially valuable relationships. It shapes the boundaries of the beneficiaries’ reliance on the fiduciary’s discretion and has been described as “the law’s blunt tool for the control of the fiduciaries discretion.”⁶⁶

All fiduciaries must act with *uberrima fides* or utmost good faith toward their beneficiaries. *Uberrima fides* is the foundation of fiduciary law and it is the cornerstone of the fiduciary relationship. If fiduciaries stray from the standard of *uberrima fides*, they are *prima facie* in breach of their duties. The fiduciary doctrine is not interested with “why” or “how” the breach occurred, but only that the breach happened. Circumstances of the event causing a breach of fiduciary duties comes into play only when determining remedies.

In law, a fiduciary is required to act within a very prescribed set of principles in matters impacting – either directly or indirectly – upon its beneficiary. There are, for example, certain positive duties that are imposed upon a fiduciary:

- A fiduciary must not act in a conflict of interest situation, must not benefit from their position, must provide full disclosure of their actions and may not compromise their beneficiary’s interests;⁶⁷
- A fiduciary may delegate their authority, provided absolute responsibility remains with the fiduciary;⁶⁸
- A fiduciary is personally liable for the direct breach of their duties or the wrongful actions of its delegates that results in a breach.⁶⁹

In a fiduciary relationship, the beneficiary acquires a number of benefits, including:

- the ability to commence legal action for any breach of fiduciary duty once the cause of action is exposed;⁷⁰

- alleging a breach is sufficient – the onus of discharging the allegation of breach rests with the fiduciary;⁷¹ and
- the ability to seek remedial aid upon finding a breach.⁷²

An examination of a fiduciary's actions is crucial and relevant when determining whether a breach of duty has occurred. The Supreme Court of Canada has stated that in breaches of fiduciary duties, the court is not only concerned with equity between the parties but also with the larger public interest in maintaining the integrity of fiduciary relationships.⁷³

The next section of this paper will look further at the fiduciary relationship and the Crown's obligations flowing from that relationship. The principles underlying this general analysis will be applied specifically to the Crown's duties in relation to Aboriginal health.

2.1 Recognition of the Crown/Aboriginal Fiduciary Relationship

The Crown's fiduciary relationship with Aboriginal Peoples has been described as *sui generis* in nature or of its "own kind or class".⁷⁴ Legal scholar Leonard Rotman explains that the Crown/Aboriginal relationship is "rooted in the historical, political, social and legal interaction of the groups from time of contact."⁷⁵ Accordingly, the unique character of this relationship gives rise to the Crown being regarded as a fiduciary.⁷⁶ Fiduciary law, as part of the common law, is also part of the *sui generis* relationship and thus applies when determining if the Crown has breached its obligations to Aboriginal Peoples.⁷⁷

Since the beginning of the British assertion of sovereignty, the guiding principles of fiduciary law have governed Crown/Aboriginal relations.⁷⁸ The fiduciary relationship, as examined below, exists through the protective language of the early treaties and the *Royal Proclamation of 1763*;⁷⁹ judicial affirmation through case law such as *Calder, Guerin* and subsequent decisions; and the entrenchment of Aboriginal and treaty rights in the *Constitution Act, 1982* has solidified the Crown's fiduciary obligations in the supreme law of Canada.

2.1.1 The Early Treaties and the *Royal Proclamation of 1763*

The manifestation of the benefits of the fiduciary relationship is found in the early treaties. For instance, Britain and the (then) Five Nations of the Iroquois Confederacy entered into a treaty in 1701 in which the Iroquois were promised that "wee [the Five Nations] are to have free

hunting for us and the heires and descendants from us the Five nations forever and that free of all disturbances expecting to be protected therein by the Crown of England.”⁸⁰ In the 1752 Treaty with the Mi’kmaw, His Majesty promised that the Mi’kmaw “shall have all favor, Friendship and Protection shewn them from this His Majesty’s Government.”⁸¹ The purpose of the treaties was to ensure that the British sovereign and Canadian governments would provide protection for Aboriginal Peoples along with other benefits in exchange for the conveyance of territory to the sovereign.

The *Royal Proclamation* was passed in October 1763. When the British government directed their Governors on the implementation of the *Royal Proclamation* they scribed:

[Y]et His Majesty’s Justice & Moderation inclines Him to adopt the more eligible Method of conciliating the Minds of the Indians by the Mildness of His Government, by protecting their Persons & Property & securing to them all the Possessions, Rights and Priviledges they have hitherto enjoyed, & are entitled to ...⁸²

The British sovereign further directed Governor James Murray to “assemble, and treat with the said Indians, promising and assuring them of Protection and Friendship on Our Part, and delivering them such Presents, as shall be sent to you for that purpose.”⁸³ English Governors were “strictly forbid, on pain of Our Displeasure, all our Subjects from making any purchases or settlements ... or taking Possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under our Protection ...”⁸⁴ The Governors were further commanded to “by all ways seek fairly to oblige them” and to “carefully protect and defend” Aboriginal nations from adversaries.⁸⁵ Governors were also directed to “especially take care that none of our own subjects, nor any of their servants do in any way harm them.”⁸⁶

The *Royal Proclamation* contains promises of security and protection for Indian nations and tribes. This language of ‘protection’ directly links the fiduciary relationship and duties of the Crown and its agents to Aboriginal Peoples as beneficiaries.⁸⁷ All dealings between Aboriginal Peoples and the Crown have fiduciary aspects as a result of the *Royal Proclamation of 1763*. The relevant text reads:

And whereas it will greatly contribute to the speedy settling of our said new Governments, that our loving Subjects should be informed of our Paternal care, for the security of the Liberties and Properties of those who are and shall become Inhabitants thereof. ...

... Such Regulations and restrictions are used in other Colonies; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in

or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England.

... And whereas it is just and reasonable, and essential to our Interest, and the Security connected, and who live under our Protection, should not be molested or disturbed ...⁸⁸

Both the English Court of Appeal and the Supreme Court of Canada have stated that, as successor to the British sovereign, the Crown in right of Canada became charged with these obligations to Aboriginal Peoples. Lord Denning M.R. interpreted the promises made to Aboriginal Peoples as being “guarantees” made by the Crown.⁸⁹ According to Lord Denning, while the promises contained in the *Royal Proclamation* were made by the British sovereign, these promises “should be honoured by the Crown in respect of Canada ‘so long as the sun rises and [the] river flows.’ That promise must never be broken.”⁹⁰

In so writing, Lord Denning stated this “interpretation would strengthen their [the Indians]’ hand so as to enable them to withstand any onslaught [by the Government of Canada]” and that “[n]o parliament should do anything to lessen the worth of these guarantees.”⁹¹ Consequently, the *Royal Proclamation* limits the activity of the Imperial authorities over the Indian nations and tribes and has been held to be analogous to an ‘Indian Bill of Rights’ and an ‘Indian Magna Carta.’⁹² Mr. Justice Hall in *Calder v. British Columbia (Attorney General)* described the *Royal Proclamation* as “a fundamental document upon which any just determination of original rights rests.”⁹³ Following constitutional reform in 1982, the Supreme Court of Canada in *R. v. Guerin* agreed with the analysis provided by Lord Denning and Mr. Justice Hall by affirming, “the historic responsibility ... to act on behalf of the Indians so as to protect their interests in transactions with third parties.”⁹⁴ In *R. v. Sioui*,⁹⁵ the Supreme Court of Canada recognized that the Crown’s fiduciary duty continues to be operative through the *Royal Proclamation of 1763* in its fulfillment of the terms of treaties:

The Proclamation confers rights on the Indians without necessarily thereby extinguishing any other right conferred on them by the British Crown under a treaty.⁹⁶

Prior to the *Guerin* decision, the Crown/Aboriginal relationship was understood to be that of ‘guardian and ward’.⁹⁷ This characterization was significant for several reasons. First, it assumed that Aboriginal Peoples – as wards – were incapable of looking after their own best interests. Second, it followed that the Crown – as guardian – would make decisions for Aboriginal Peoples.⁹⁸ Third, a guardian-ward relationship meant that, under Canadian law, the Crown acted out of a moral rather than any legal obligation and was therefore not administratively

responsible for its actions. In 1885, the Supreme Court of Canada characterized this obligation as being “a sacred political obligation” and *not* a “legal obligation”.⁹⁹ In light of this “sacred political obligation”, the cases following these assessments became known as the “political trust” cases.¹⁰⁰

2.1.2 Judicial Affirmation of the Crown’s Fiduciary Obligation

The Supreme Court of Canada in its 1984 *Guerin* decision rejected the characterization of the Crown/Aboriginal relationship as that of “guardian and ward”. Instead, it found that the relationship was fiduciary in nature and the Crown has fiduciary duties and responsibilities towards Aboriginal Peoples.¹⁰¹

In *Guerin*, the federal Crown had entered into a lease on behalf of the Musqueam First Nation for a portion of reserve land the band had surrendered to the Crown in 1957. In surrendering a portion of its traditional territory, the Musqueam First Nation understood that the Crown would lease the land in accordance with the terms agreed to by the band council. While the Crown did lease the land for income to a golf club, the terms agreed to by the Crown were less favourable than the terms under which the First Nation had agreed to surrender the land.

The Musqueam First Nation argued before the Supreme Court that political trust arguments successfully invoked by the Crown at the Federal Court level were not applicable to the relationship between the Crown and the Musqueam First Nation. The Supreme Court agreed and found that the Crown’s duty was equitable rather than political and rooted in law rather than moral obligation.¹⁰²

The significance of the Supreme Court of Canada’s rejection of the political trust characterization of Canada’s relationship with Aboriginal Peoples along with its no-fault administrative responsibility in favour of a fiduciary relationship cannot be under-estimated: the fiduciary obligation is a legally enforceable and compensable obligation.

Chief Justice Dickson articulated the crux of the fiduciary principle in the *Guerin* decision:

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty ... [Whenever] one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, that party thus empowered becomes a fiduciary.¹⁰³

The Court also stated that the inherent rights arising under the *sui generis* legal regime of Aboriginal law and title make the political trust decisions inapplicable.¹⁰⁴ In short, *Guerin* established that the Crown's fiduciary obligations extends to all Aboriginal interests, carries a significant discretionary element, and is a broad encompassing duty. Although, the fiduciary obligation in *Guerin* arose in the context of a land surrender, the case did lay the foundation for applying the fiduciary obligation to other aspects of the Crown/Aboriginal relationship.¹⁰⁵

Although the *Guerin* decision was the first time that a Canadian court recognized the existence of a fiduciary relationship, the scope of this relationship was further defined in *Kruger v. R.*¹⁰⁶ *Kruger* determined that the Crown's fiduciary obligations not only were applicable outside of the context of surrender of Indian lands but were also a fundamental part of the *sui generis* relationship between the Crown and Aboriginal Peoples. The *Sioui* case was also important since, in a context other than the surrender of territorial lands, the Court established that both the federal and provincial Crown owed a fiduciary obligation to Aboriginal Peoples when exercising their legislative authority.¹⁰⁷ In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, McLachlin J. submitted that a fiduciary obligation will arise where the Crown has power and control, and therefore discretion, over Aboriginal interests:

Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other.¹⁰⁸

The Supreme Court is clear that when a beneficiary relies on a fiduciary, the fiduciary carries a certain amount of discretion when discharging its duties. There are strict guidelines that govern the discretionary behavior of the fiduciary. Chief Justice Lamer of the Supreme Court of Canada explained the need for the Crown to guard against an unstructured discretionary administrative regime when dealing with Aboriginal rights:

In light of the Crown's unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties,

and the statute will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.¹⁰⁹

This statement is significant, as it directs the Crown to be cognizant of its fiduciary duty when carrying out its legislative function, especially when it exercises discretionary power over Aboriginal Peoples.

2.1.3 The Entrenchment of Aboriginal and Treaty Rights in the *Constitution Act, 1982*

Section 35(1) of the *Constitution Act, 1982* constitutionalized the Crown fiduciary obligation through the entrenchment of Aboriginal and treaty rights.

Section 35(1) states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.¹¹⁰

Canada's Constitution carries the highest power in Canadian law. Section 52(1) reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.¹¹¹

As Professor Hogg notes:

A constitution has been described as “a mirror reflecting the national soul”:¹¹² it must recognize and protect the values of a nation.¹¹³

The *Constitution Act, 1982*, section 35(1) accorded constitutional status to “existing” Aboriginal and treaty rights. For the purpose of section 35(1) these rights are those that were not extinguished before April 17, 1982. Prior to 1982, Aboriginal rights did exist and were recognized under common law. They did not have constitutional status and Parliament could extinguish/regulate those rights at any time. However, the Supreme Court has confirmed that the regulation of an Aboriginal activity by specific imperial treaty, act, or legislation does not amount to its extinguishment but affirms the continuity of an Aboriginal right.¹¹⁴

The entrenchment of Aboriginal and treaty rights in the *Constitution Act, 1982* further placed restraints on the exercise of governmental power in relation to these rights. The *Sparrow*¹¹⁵

decision is one of the most important cases dealing with the restriction of Crown interference on Aboriginal and treaty rights.¹¹⁶ In *Sparrow*, the court rejected the political trust arguments and extended the concept of an enforceable statutory fiduciary obligation to a comprehensive constitutional fiduciary obligation that applies to virtually every facet of the Crown-Aboriginal relationship.¹¹⁷ The Court further describes the Crown/Aboriginal fiduciary relationship as “trust-like rather than adversarial”:

[T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.¹¹⁸

The Supreme Court of Canada in *Sparrow*¹¹⁹ found that the source of the fiduciary obligation stemmed from the rights identified in section 35 of the *Constitution Act, 1982*, and that the words “recognition and affirmation” used in section 35 “incorporate the fiduciary relationship and import some restraint on the exercise of sovereign power.” The Court added:

Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.¹²⁰

The Supreme Court of Canada has made it clear that not only must the federal government reconcile its power with its duties to Aboriginal Peoples but also all government action must comply with the Constitution and must be justified before the government infringes or denies an Aboriginal right.¹²¹ The courts must balance the Crown’s constitutional fiduciary obligations with the Crown’s justification for the infringement. In this sense, the fiduciary obligation concept polices the line between respect for Aboriginal and treaty rights and the government’s exercise of its powers.

The Supreme Court of Canada set out a ‘justification test’ in *Sparrow* in an effort to determine whether the Crown’s interference with an Aboriginal or treaty right can be justified:

- the government must prove a valid legislative objective for the interference;¹²²
- the Crown’s actions must be consistent with its fiduciary duty towards Aboriginal people;¹²³
- the interference must be minimal;¹²⁴

- fair compensation must be paid; and
- the affected Aboriginal group(s) must be consulted.¹²⁵

It is clear then, that the fiduciary duty places an obligation on the government to consider certain factors before they take any action that could infringe Aboriginal rights. Lamer C.J. in *R. v. Van der Peet*¹²⁶ was clear that when the possibility of infringement exists, certain principles must guide the Crown's actions. He noted that because of the fiduciary relationship, the "honour of the Crown" is at stake in all dealings the Crown has with Aboriginal Peoples. Consequently, section 35 rights, treaties, any statutes or constitutional provisions that protect the interests of Aboriginal Peoples must be given a "large and liberal" interpretation and any doubt or ambiguity regarding what falls within section 35 rights must be resolved in favor of Aboriginal Peoples as beneficiaries of these rights.¹²⁷ Aboriginal rights cannot be extinguished and may be infringed upon only if the requirements of the *Sparrow* justification test are met.¹²⁸ This prohibition applies to federal and provincial legislation.¹²⁹

The legal concept of Aboriginal rights rests on the recognition that when Europeans arrived in North America, Aboriginal Peoples were already there. As early as 1832, in *Worcester v. State of Georgia*,¹³⁰ the Chief Justice of the United States Supreme Court commented that the origins of Aboriginal claims to land and their right to self-governance lay in the relationship that evolved between their pre-existing rights as "ancient possessors" of North America and the assertion of sovereignty by European nations.

This finding, that Aboriginal societies were here first and have unique rights, has been quoted with approval by the Supreme Court of Canada. In *Calder*, Judson J. noted that "the fact is that when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had for centuries. This is what Indian title means ..."¹³¹ It is this prior occupancy by Aboriginal Peoples, then, which is the foundation of Aboriginal rights.¹³² As a result, the existence of Aboriginal rights is not dependent upon treaties or Crown grants,¹³³ presumed grant or prescription,¹³⁴ or on legislative enactments, executive orders or judicial declarations;¹³⁵ rather, Aboriginal rights are based on the historic occupation and use of ancestral lands by Aboriginal Peoples.¹³⁶ The source of these Aboriginal rights resides in or is derived from Aboriginal knowledge, language, and laws.¹³⁷

As noted by the Supreme Court of Canada in *R. v. Delgamuukw*,¹³⁸ when the British sovereign asserted jurisdiction over Aboriginal lands, these Aboriginal legal regimes and their peoples were thereby protected. Section 35(1) of the *Constitution Act, 1982* provides the framework

for the conciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

Evidence concerning the therapeutic ceremonies and healing systems practiced by Aboriginal Peoples demonstrates that such ceremonies and practices were a distinct and integral part of Aboriginal societies.¹³⁹ Essential to Aboriginal societies was the maintenance of good health. Aboriginal Peoples have complex and diverse medical and healing traditions that pre-date European contact. The explorers and traders who witnessed and wrote about these practices acknowledged their importance in the healing practices of Aboriginal Peoples. Europeans did not teach Aboriginal Peoples how to heal or practice healing methods – rather, these methods of healing and practice were already in existence when the Europeans arrived in North America.

The inherent right to health and Aboriginal health care practices have been said to be simply one manifestation of a broader-based bundle of Aboriginal rights.¹⁴⁰ For example, various methods of Aboriginal healing and maintenance of good health have been documented (and many continue to exist today). One method has been referred to as ‘sucking’ or ‘cupping’ and its practitioners are referred to as ‘sucking doctors’. The technique is used when an object or a poison has entered the body. The sucking doctor then removes the object or poison by placing their mouth over the point of entry and performing a series of alternating sucking and blowing actions.¹⁴¹

Another important healing ceremony has been referred to as the “shaking tent” or “conjuring lodge”. The shaking tent had a variety of functions including diagnosing the cause of illness.¹⁴² While the shaking tent was common among most Aboriginal groups, the sweat lodge was used universally by different Aboriginal groups. The sweat lodge was used to facilitate prayer, maintain health and to address particular health or social concerns. Specific health problems addressed by the sweat lodge included febrile symptoms, chronic rheumatism, headache, fast pulse, catarrh and sore muscles. In general it was used for most types of health problems.¹⁴³

Certain practices around health, healing and medicine, are practices integral to all Aboriginal Peoples as part of their unique and distinctive societies. These customs reflect the varied and distinctive cultures of the Aboriginal societies and are unique to these specific groups. Sákéj Youngblood Henderson expressed that,

[t]he Supreme Court acknowledged that these cultural rights arise within a system of beliefs, social practices and ceremonies of Aboriginal people. They are traced back to their ancestral Indigenous order and their relationship with ecology.¹⁴⁴

The rights within the practices and traditions reflect the distinctive cultures of Aboriginal groups. These practices operated before the assertion of British sovereignty in treaties or proclamations and they existed before the introduction of British common law.¹⁴⁵ These practices are unique to Aboriginal people, existed in 1982, when section 35 was enacted and are, therefore, recognized and affirmed in their “full form”.

Treaty rights, unlike Aboriginal rights, are not derived from Aboriginal occupation of lands but are derived from negotiated agreements between the Crown and Aboriginal Nations. Treaties are legal instruments of Canadian law. The purpose of the treaties was to ensure that the British sovereign and Canadian governments would provide protection for Aboriginal Peoples. By conveying territory to the sovereign it was understood that the sovereign could use the lands to generate beneficial revenue for government services, services that would include Aboriginal Peoples.

In addition, the treaties incorporated specific federal relief when they are overtaken by any calamity, especially the intersection of health and poverty.¹⁴⁶ The Supreme Court of Canada stressed that:

In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence.¹⁴⁷

Wilson J. in *Guerin* confirmed that a fiduciary duty “crystallized upon the [land] surrender into an express trust of specific land for a specific purpose.”¹⁴⁸ According to Hutchins, Schulze and Hilling,

[t]he existence of fiduciary obligations by the Crown should be presumed whenever Aboriginal Peoples are constrained in exercising rights to lands or resources, or in the exercise of their internal or external sovereignty. *This is because those constraints were either conceded by them in return for promises, or else the Crown has imposed them unilaterally and without justification.*¹⁴⁹ (emphasis added)

From the vantage point of the Indian people who negotiated the treaties, the Crown commitments in many treaties were directed at essential issues such as health and health care.¹⁵⁰ The treaties were negotiated and drafted to ensure the survival of the Aboriginal people, who had suffered from the trans-Atlantic transportation of epidemics related to trading systems and settlements, not to hasten their death by disease or starvation.¹⁵¹ In the Victorian treaties, in particular, health care was central to government services.¹⁵²

As early as 1957, the federal government acknowledged that medical care was a treaty obligation but insisted that such an obligation existed only under Treaty No. 6.¹⁵³ Canada, however, did not implement any special programs for the beneficiaries of Treaty No. 6. The position of the Medical Services Branch (of the National Health and Welfare Department) was that, the responsibility for discussing treaties on behalf of Canada resided with the Department of Indian Affairs. The Medical Services Branch maintained that it was prepared to participate in discussions of a treaty matter involving health. The Department of Indian Affairs, on the other hand, adopted the position that discussion of a treaty right to health was not their responsibility as the Medical Services Branch was responsible for health.¹⁵⁴

In 1964, the government announced that it had “never accepted the position that Indians are entitled to free medical services by treaty rights.”¹⁵⁵ This position was reiterated again in 1970:

Despite popular misconceptions of the situation and vigorous assertions to the contrary, neither the federal nor any other government has any formal obligations to Indians or anyone else, with free medical services.¹⁵⁶

The government has remained steadfast in its position. The 2002 Romanow report on *The Future of Health Care in Canada* notes, “[a]ccording to the federal government, however, there is no constitutional obligation or treaty that requires the Canadian government to offer health programs or services to Aboriginal peoples.”¹⁵⁷

“Free” medical services have always been a problematic characterization. Health services were delivered from the funds generated by treaty cession of beneficial interest in land and tax regimes in which Aboriginal Peoples participated. As such, the provision of health services to Aboriginal people is properly described as pre-paid medical services.¹⁵⁸ They were never free.

Regardless of the Crown’s position that the language in the treaties does not create an entitlement to services, including health care, the fundamental source of fiduciary obligations arises from the early treaties and the *Royal Proclamation* and from the trust-like relationship between the British Crown (and its successors) and Aboriginal Peoples. Certain positive duties are imposed upon the federal and provincial governments because of this fiduciary relationship. In 1982 the *Constitution Act* constitutionalized the fiduciary obligations in the supreme law of Canada through the entrenchment of Aboriginal and treaty rights.

2.2 The Crown's Duty to Consult

The obligation to consult with Aboriginal Peoples arises out of the trust-like relationship which exists between the Crown and the Aboriginal Peoples and the concomitant fiduciary duty owed by the federal and provincial Crown to Aboriginal Peoples. This fiduciary duty is incorporated in section 35(1) of the *Constitution Act, 1982*.¹⁵⁹ *Sparrow, Delgamuukw* and subsequent decisions have held that the Crown has a fiduciary duty to Aboriginal Peoples when a government decision or action may have the effect of interfering with an Aboriginal or treaty right, which obligation requires the Crown to consult with the affected Aboriginal Peoples.

The terms “consultation” and the “duty to consult” have been significantly misinterpreted and misused by the government when proposing or enacting legislation that impacts on Aboriginal or treaty rights. Information sessions, telephone calls and Internet postings¹⁶⁰ have been used by the government to execute their duty to consult, erroneously believing that their duty has been discharged by these methods alone. In the context of Aboriginal health, any legislation, regulation or potential infringement of section 35 rights may have an additional devastating effect on the health of Aboriginal Peoples. For instance, Health Canada is proposing the regulation of natural health products. Without adequate consultation, the government may not only breach its fiduciary obligations through this approach but the regulation may result in permanent destruction of Indigenous knowledge, traditional practices, and medicines.¹⁶¹

The courts have defined some principles and set minimum standards for what the duty to consult means – however, uncertainty remains concerning the precise scope of this duty and what is exactly required to satisfy this duty in full. Some key principles articulated by the courts thus far, have helped shape the definition of meaningful consultation. For example:

- There is always a duty of consultation.¹⁶²
- Upholding the honour of the Crown is an established principle and includes consultation before Aboriginal or treaty rights are infringed.¹⁶³
- Consultation must occur “early in the planning stages” of a project and not at a point where a decision in relation to a project has “essentially been made.”¹⁶⁴
- The duty to consult includes not only the federal Crown but includes a similar duty for the provincial Crown.¹⁶⁵
- The Crown carries the burden of proving meaningful consultation.¹⁶⁶

- A standard public consultation/information session does not satisfy the test for adequate consultation with Aboriginal Peoples.¹⁶⁷
- A distinct consultation with the rights' holders is required.¹⁶⁸
- The Crown cannot delegate its duty to consult to an “interested third party”,¹⁶⁹ but this does not mean that a fiduciary duty cannot be transferred to a third party.¹⁷⁰
- Consultation must be “adequate” and “meaningful”¹⁷¹ and must “substantially address” the concerns of the First Nation,¹⁷² and in some instances, the full consent of a Nation may be required to fulfill the duty to consult.¹⁷³
- The Crown must “fully inform itself of the practices and views of the First Nation affected.”¹⁷⁴
- The Crown must ensure that the group affected is provided with full information with respect to the proposed legislation or decision and its potential impact on Aboriginal rights.¹⁷⁵
- The Crown must take the views of the First Nation seriously.¹⁷⁶
- The Crown’s obligation to consult is “continuing and ever present” and does not end if the Crown breaches its duty.¹⁷⁷
- Even if Aboriginal or treaty rights are not proven *prima facie*, the Crown is not relieved of its duty to consult.¹⁷⁸ Section 35 of the *Constitution Act, 1982* protects those existing rights at common law.¹⁷⁹
- The Crown must ensure that the substance of the First Nation’s concerns are addressed or face the very real possibility that the courts will overturn the decision.¹⁸⁰

To sum up, any government action or legislation that has the potential to impact upon the rights of Aboriginal Peoples requires meaningful consultation. This concept of consultation necessarily applies to government legislation, policies, inactions and actions and must follow the guidelines as established by the courts.

3 Fiduciary Obligations and Aboriginal Health – The ‘Disconnect’

Considering that Aboriginal Peoples experience an overall inferior health status when compared to the non-Aboriginal population, it is not surprising that various recent studies on Aboriginal health and health care have found a “disconnect” between Aboriginal Peoples and Canadian governments that accounts for this poor health status.¹⁸¹

The “disconnect” was noted as early as 1984 at the Conference of First Ministers on Aboriginal Constitutional Matters. Prime Minister Pierre Elliott Trudeau noted: “[a] study the government made a few years ago of the conditions of the Indian peoples presents a sorry state of affairs”.¹⁸² He noted that the life expectancy of Aboriginal Peoples was ten years less than the population as a whole; suicides, particularly in the 15-24 age group, were more than six times the national rate and one in three families lived in overcrowded conditions.

The Prime Minister remarked:

These statistics illustrate that aboriginal peoples have long been victims of severe injustices that are not tolerable in Canadian society. As a small but significant segment of our population they have suffered and for the most part continue to suffer acutely from economic disadvantage, social degradation, and political obscurity. But perhaps the greatest injustice is the hard fact that their condition has been almost totally ignored by the mainstream society, including its governments. Both levels of government have some degree of responsibility for the aboriginal peoples, either as citizens or as descendants of the original inhabitants of this country.¹⁸³

Prime Minister Trudeau further elaborated:

Federal and provincial governments, in close contact with the aboriginal peoples, must work together to put in place the socio-economic infrastructures that will enable them to fulfill their reasonable expectations as citizens of Canada. If this is to be achieved it will call for the maximum effort from all concerned. The provinces will have to fulfill their own obligations to the aboriginal peoples as Canadians resident in the provinces. The federal government must fulfill its special obligations to the aboriginal peoples that derive from their ancestry. The aboriginal leaders too must share in the design and management of these programs and services to help ensure that they are properly in place to meet the needs of their people.¹⁸⁴

A similar tone of concern was expressed by Prime Minister Brian Mulroney at the 1985 Conference of First Ministers on the Rights of Aboriginal Peoples:

Improvements to the economic and social circumstances of aboriginal peoples must be pursued at the same time as changes to our constitution are sought to define the rights of aboriginal peoples. Action is required on both fronts and these two sets of endeavours, while separate, are mutually supportive ... Governments require a better grasp of aboriginal peoples' needs and aspirations. If they demonstrate sufficient creativity and flexibility, then all of Canada will benefit from aboriginal peoples who are secure in their own cultures and full partners in Canadian society ...¹⁸⁵

The 2002 report of *The Commission on the Future of Health Care in Canada* acknowledged a disconnect between Aboriginal Peoples and Canadian governments that account for the poor health status. Among other underlying reasons, competing constitutional assumptions; fragmented funding for health services, and different cultural and political influences contribute to the poor health status.¹⁸⁶ The Commission summarizes the federal government position concerning what it understands to be the government's responsibilities in relation to the provision of health care-related services to Aboriginal Peoples:

According to the federal government, however, there is no constitutional obligation or treaty that requires the Canadian government to offer health programs or services to Aboriginal peoples. As a result, the federal government limits its responsibility to being the "payer of last resort." A 1974 ministerial policy statement describes federal responsibility for Aboriginal health issues as voluntary, aimed at ensuring "the availability of services by providing it directly where normal services [were] not available and giving financial assistance to indigent Indians to pay for necessary services when the assistance [was] not otherwise provided" (Canada, Health and Welfare 1974). This continues to be the position of the federal government.¹⁸⁷

While it is accurate that the *Constitution Act, 1867* is silent on the matter of health and health care, this silence affects all Canadians, not just Aboriginal people. No constitutional obligations exist for the offering of any health programs or services to anyone in Canada.

There is no question that non-Aboriginal Canadians enjoy a better standard of health and health care than do Aboriginal Peoples although Aboriginal Peoples have constitutionally entrenched rights. These rights are " ... designed to protect integral aspects of Aboriginal health. Aboriginal rights are based on pre-contact views and practices of Aboriginal knowledge, heritage, law, culture, and traditions of health and healing but also are inherent in the continuity of practices that govern the daily lives of Aboriginal people."¹⁸⁸

The entrenchment of Aboriginal and treaty rights in the *Constitution Act, 1982* means that "every Aboriginal man, woman, and child carries a remarkable set of constitutional rights"¹⁸⁹ – something that non-Aboriginal Canadians do not possess. These rights, by virtue of being

entrenched in the Constitution are given the greatest protection by law in the country.¹⁹⁰ Given these facts, it is clear that the disregard of these constitutional rights has created a vast inequality of services for Aboriginal Peoples, regardless of the constitutional silence on health.

It appears that the Romanow Commission is correct in noting that competing constitutional responsibilities provide for fragmented funding. However, these various categories are constructs of the imperial and federal governments. From the Aboriginal perspective, the fragmentation of the Crown into “federal” and “provincial” governments has never shaken their belief that the federal Crown has responsibilities to them. As Dickson C.J. of the Supreme Court of Canada commented, the Aboriginal perspective of their relationship with the Crown does not depend on the particular representatives of the Crown, since “[f]rom the Aboriginal perspective, any divisions that the Crown has imposed on itself ... are internal to itself.”¹⁹¹

Moreover, to the extent that some part of the funding problem is owing to the federal-provincial jurisdictional wrangling, the fact remains that the divisibility of the Crown while providing an administrative convenience for the Government of Canada, does erode fiduciary obligations.

As noted, health services are delivered from the funds generated by treaty land surrenders and land taxes. Under the treaty cession of their beneficial interest in land, and Aboriginal participation in most of the tax regimes, Aboriginal Peoples have already paid for their medical services.¹⁹² The government’s position that Indians are not entitled to prepaid medical services by virtue of existing treaty rights¹⁹³ and the characterization that the government is the “payer of last resort” is disingenuous and unequivocally disregards existing treaty promises and the entrenchment of existing Aboriginal and treaty rights to health and health care in the Constitution.

Fiduciary law principles are strict in relation to conflict of interest situations: fiduciaries must not act in a conflict of interest situation, must not benefit from their positions, must provide full disclosure of their actions and may not compromise their beneficiaries’ interests.¹⁹⁴ The Crown fiduciary duty appears to be an oxymoron, however, when one examines the government’s actions in matters impacting on Aboriginal Peoples. By way of example, the Crown has unilaterally decided what to do with the lands, interests and assets of its Aboriginal beneficiaries. The Crown derives its resources from the land base obtained through treaties and land surrenders and from taxes, and then uses its virtually unlimited resources to oppose Aboriginal court challenges to its powers, thereby benefiting from its position. By so doing, it literally converts its position from fiduciary to the discretionary beneficiary of its own position and power.¹⁹⁵

It is understandable that different cultural and political influences are noted as a disconnect between the government and Aboriginal health. Although entrenched in the *Constitution Act, 1982*, Aboriginal and treaty rights have not been recognized by the government when developing health policies. As a result, Aboriginal health policies continue to reflect the political trust theory long rejected by the courts, i.e., that Aboriginal Peoples are incapable of making decisions on their own behalf. Such policies were developed pre-*Guerin* but continue today despite constitutional legal reform. The current assumptions of Health Canada hold that fiduciary obligations do not extend to the provision of culturally appropriate health care services to Aboriginal Peoples.¹⁹⁶

To summarize, the underlying reasons offered to account for the ‘disconnect’ between the government and Aboriginal Peoples regarding the poor health status of Aboriginal Peoples cannot be relied upon to justify or maintain the status quo in relation to Aboriginal health without the acknowledgment that such continuance is owing to a disregard for existing Aboriginal and treaty rights to health and health care, a breach of the Crown’s fiduciary obligation, a discriminatory exercise of discretion and a conflict of interest position from which the federal government continues to benefit.

Conclusion

The federal government recognizes the existence of their fiduciary obligations and acknowledges that fiduciary duties apply to Aboriginal Peoples in general. The government's report, *Fiduciary Relationships* (1995), confirms that it is the policy of the federal government to recognize these fiduciary duties.¹⁹⁷ The precise "nature and scope of this fiduciary relationship" along with the political, legal and financial implications,¹⁹⁸ however, remain undefined. Both the federal (and provincial) governments have clear fiduciary obligations toward Aboriginal Peoples. The source of these obligations arise from the early treaties, from the trust-like relationship between the British Crown (and its successors) and Aboriginal Peoples reflected in the *Royal Proclamation*, and from the *Constitution Act, 1982*. Certain positive duties are imposed upon the federal government because of this fiduciary relationship. Core elements include the Crown's duty to provide full disclosure of its actions so as not to compromise Aboriginal or treaty rights and the requirements that the Crown refrain from acting in conflict of interest situations or benefit from its role as fiduciary. Case law provides that if there is any possibility of infringement on Aboriginal or treaty rights, meaningful consultation is required, and justification must be advanced to account for such infringement. Consultation does not mean a standard public information/consultation process or session – but requires a great deal more.

The test of outcomes may be applied when examining the discretionary aspect of the Crown's fiduciary obligations. One only has to look at the unequal health status to witness how government discretion has been exercised. There is ample evidence to prove that the health status of Aboriginal people in Canada, sadly, falls well below that of non-Aboriginal Canadians. These outcomes reveal the magnitude of the government's overall failure to discharge its discretionary powers in relation to the fiduciary obligation it has towards Aboriginal Peoples.¹⁹⁹ Can the government act unilaterally and simply provide the level of services it wants or must the government seek to achieve a certain level of health care for Aboriginal people to effectively discharge its obligation? Given the equality provisions of the *Charter of Rights and Freedoms*,²⁰⁰ one must surely expect that Aboriginal Peoples are entitled to the same standards of health as Canadians generally.

In light of the disparity in outcomes in standards of health, it is clear that past and present government legislation, policies, actions and inaction have adversely impacted upon Aboriginal Peoples with devastating results. It is untenable to think that Aboriginal Peoples have either agreed to accept this, or that the Canadian government is removed from its fiduciary obligations

to consult, to avoid sharp dealing and/or abide by the terms of the treaties and agreements it entered into.

The Supreme Court of Canada has affirmed that the fiduciary obligation limits the activities and policies of the federal or provincial Crown toward Aboriginal Peoples.²⁰¹ It has cast a discussion of the Crown's constitutional fiduciary obligations to Aboriginal Peoples against the backdrop of the Canadian law's failure to recognize Aboriginal claims to land and, indeed, the law's general failure to acknowledge or uphold Aboriginal and treaty rights.²⁰² The Court has held that "historical policy on the part of the Crown is ... incapable of, in itself, delineating" aboriginal and treaty rights and "[t]he nature of government regulations cannot be determinative of the content and scope of an existing Aboriginal right."²⁰³ Despite these clear directives, the federal government continues to determine the scope of Aboriginal and treaty rights to health without the input or meaningful participation of Aboriginal Peoples.

The federal government, under the auspices of Health Canada, cannot reasonably maintain that health services provided to First Nations and Inuit Peoples are "voluntary" and not required by law but simply a matter of policy.²⁰⁴ Such a characterization is a discriminatory reading of Canada's commitments to provide the highest attainable standard of physical and mental health to *all* residents of Canada²⁰⁵ and to facilitate reasonable access to health services without financial or other barriers based on need.²⁰⁶

Ironically, the federal government's policy recognizes and affirms the government's unique constitutional obligations to Aboriginal Peoples but fails to implement these obligations to certain existing Aboriginal and treaty rights – including access to health and health care. Instead, Canada's health policies and guidelines affecting Aboriginal Peoples' health should be examined to ensure that they no longer reflect the outdated wardship model of Crown/Aboriginal relations but instead reflect the fiduciary relationship that the Supreme Court of Canada has stated properly characterizes Crown/Aboriginal relations.

Notes

Law reporters, law reviews and courts cited in the notes have been identified by the following abbreviations:

A.C.	Appeal Cases
All E.R.	All England Law Reports
App. Cas.	Appeal Cases
B.C.C.A.	British Columbia Court of Appeal
B.C.L.R.	British Columbia Law Reports
B.C.S.C.	British Columbia Supreme Court
C.A.	Court of Appeal
Can. Bar Rev.	Canadian Bar Review
Ch.	Chancery
C.L.R.	Commonwealth Law Reports
C.M.A.J.	Canadian Medical Association Journal
C.N.L.C.	Canadian Native Law Cases
C.N.L.R.	Canadian Native Law Reporter
D.L.R.	Dominion Law Reports
E.R.	Exchequer Reports
F.C.	Federal Court Reports
F.C.A.	Federal Court of Appeal
F.C.T.D.	Federal Court Trial Division
F.T.R.	Federal Trial Reports
H.C. Aus.	High Court of Australia
H.L.	House of Lords
L.Ed.	United States Supreme Court, Lawyers' Edition
McGill L.J.	McGill Law Journal
Med. Ser. J. Canada.	Medical Services Journal, Canada
N.W.T.T.C.	Northwest Territories Territorial Court
O.A.C.	Ontario Appeal Cases
Ont. C.A.	Ontario Court of Appeal
Osgoode Hall L.J.	Osgoode Hall Law Journal
P.C.	Privy Council
Q.B.	Queen's Bench
Sask. L. Rev.	Saskatchewan Law Review
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
U.S.	United States Reports
U.T.L.J.	University of Toronto Law Journal
W.W.R.	Western Weekly Reports

- 1 *Guerin v. R.*, [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120 [*Guerin*].
- 2 L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 3 [Rotman], Scholars have struggled to “pin down the fiduciary principle”, see for example: J. Hurley, “The Crown’s Fiduciary Duty and Indian Title: *Guerin v. the Queen*” (1985) 30 McGill L.J. 559; B. Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261; W.R. McMurtry & A. Pratt, “Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective” [1986] 3 C.N.L.R. 19; R.H. Bartlett, “The Fiduciary Obligation of the Crown to the Indians” (1989) 53 Sask. L. Rev. 301; K. McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan, 2001) [McNeil];

M. Stevenson and A. Peeling, “Probing the Parameters of Canada’s Crown – Aboriginal Fiduciary Relationship” in Law Commission of Canada, Association of Iroquois and Allied Indians, *In Whom We Trust: A Forum on Fiduciary Relationships* (London: Irwin, 2002) [*In Whom We Trust*].

3 Canada, Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues – A Guide for Managers* (Ottawa: n.p., 1995) [Justice] recognized the existence of this fiduciary obligation and stated that this fiduciary duty must be applied to Aboriginal people in general.

4 Canada, First Nations and Inuit Health Branch, “First Nations and Inuit Control – Historical Perspective” *Handbook for Pilot Projects* (October 29, 2001) [*Handbook*], online: Health Canada <http://www.hc-sc.gc.ca/fnihb/nihb/publications/pilot_projects_handbook/part_a_overview.htm>. Although equally recognized within the *Constitution Act, 1982*, the Métis are nevertheless excluded from these health policies.

5 *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 141, 139 D.L.R. (3d) 417.

6 Claude Emanuelli, “Canada” in Hernán L. Fuenzalida-Puelma/Susan Scholle Connor, eds., *The Right to Health in the Americas: A Comparative Constitutional Study* (Washington: Pan American Health Organization, 1989) 138 at 141. See also, Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Canadian Government Publishing, 2002) [Romanow], online: Health Canada <<http://www.hc-sc.gc.ca/english/care/romanow/hcc0086.html>> at Ch. 1 at 3 where it is stated that the reason for silence in the allocation of legislative power is that the concept of health care is a modern one to British society with assumptions and meanings that could not have been predicted by the Constitution:

A simple analogy to ‘health and health care’ would be ‘the environment,’ another contemporary concept foreign to 19th century thinking and, therefore, absent from the original constitutional division of powers.

7 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. The *British North America Act, 1867* (U.K.), 30 & 31 Vict., c.3 (*B.N.A. Act, 1867*) was the original name of the legislation that provided for the formation of the Dominion known as Canada. See s.92(16).

8 This paper uses the term Aboriginal people as a collective name for the original people of Canada. This term is also used as per s.35(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Constitution Act*]. The term “aboriginal peoples of Canada” in the *Constitution Act* refers to the “Indian, Inuit and Métis. The terms First Nation, Indian and Aboriginal are used interchangeably depending upon the documentation of the historical and legal language used.

9 For instance the linguistic differences alone are vast with more than 50 distinct groups among First Nations, see J. Waldram, D.A. Herring, T.K. Young, *Aboriginal Health in Canada. Historical, Cultural and Epidemiological Perspectives* (Toronto: University of Toronto Press, 1995) [Waldram] at 5-6.

In Canada, Canadian Heritage, Corporate Review Branch, “Aboriginal Languages in Canada: Background and Trends 2003” *Aboriginal Languages Initiatives Evaluation* (Ottawa: Public Works and Government Services, 2000), online: <http://www.pch.gc.ca/progs/em-cr/eval/2003/2003_01/5_e.cfm>, it is noted that,

[t]he Inuktitut language belongs to the Eskimo-Aleut language family. Inuktitut is a sub-branch of this family. There are approximately 16 Inuktitut dialects spoken in areas of Siberia, Alaska, Canada and Greenland.

In Canadian North, “Nunavut – Our Land” *Canadian Geographic* (Royal Canadian Geographical Society, 2002), online: <<http://www.cangeo.ca/magazine/jf99/nunmap.html>>, it is indicated that,

[s]eventy percent of Nunavut’s people report an Inuktitut dialect as their mother tongue. There are seven dialects and 17 sub-dialects in Nunavut.

The Métis speak a variety of First Nations languages as well as the Michif language (Waldram, *supra* note 9 at 15). The Métis National Council describes the Michif language:

The Métis people are not only a mix of two diverse races, but also a combination of their distinct cultures. As such, Métis people developed their own language using pieces from both their European and First Nations parents. Michif is the result of a marriage between French and Cree. It uses French nouns and noun phrases with the Plains Cree verb system. As the language moves east, it begins to incorporate the Ojibway language. (Métis National Council, “Michif” (2001), online: <<http://www.Métisnation.ca/ARTS/michif1.html>>.)

Also, Michael Fisher, Métis Centre NAHO notes the following:

Bradford Morse, Faculty of Law, University of Ottawa, argues there are more than one Métis peoples in Canada. He outlined the “law and politics” of Aboriginal identities as based on section 35 of the *Constitution Act, 1982*, and said s.35(2) listed three distinct types of peoples, not just three peoples. This definition is necessary from a legal standpoint for a number of reasons: delineating constitutional rights, general legislation relating to Aboriginal Peoples, special programs and services and jurisdictional responsibilities. The boundaries between Métis and Indian were never clearly defined, but it was more noticeable than between Métis-Inuit boundaries, though this has been a little clearer in Labrador. (Conference Summary, *The Supreme Court of Canada Recognizes Métis Rights*, Toronto, ON, Nov. 20-21, 2003.)

10 The *Indian Act, 1876*, S.C. 1876, c.18 was the operative federal legislation for s.91(24) of the *Constitution Act, 1867*. First passed in 1876, the *Indian Act* was designed to facilitate administration of programs to Indians and to assimilate Indians into mainstream society. It included definitions of who was considered Indian. Every status Indian in Canada has a registration number that facilitates the gathering of social, economic and health data for the federal government.

11 *Re: Eskimos*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417 [*Eskimos*].

12 Although the Métis have a legal status for health care which is no different than that of non-Aboriginal Peoples in Canada, the recent *Powley* decision will likely have a enormous impact on the present Métis exclusion from services and programs (*R. v. Powley*, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321):

On September 19, 2003, the Supreme Court of Canada, in a unanimous judgment, said that the Powleys, as members of the Sault Ste Marie Métis community, can exercise a Métis right to hunt that is protected by s.35. (Métis National Council, “Fulfilling Canada’s Promise: *R. v. Powley* - A Case Summary and FAQs” (2003), online: <http://www.Métisnation.ca/POWLEY/canadas_promise/supreme_court.html>.)

13 According to the Statistics Canada 2001 Census, Aboriginal Peoples comprise 23 percent of the population in the Yukon, 50 percent in the Northwest Territories and 85 percent of the population of Nunavut, each with different proportions of First Nations, Inuit and Métis (Canada, Statistics Canada, 2001 *Census: Analysis Series Aboriginal Peoples of Canada: A Demographic Profile* (Ottawa: Supply and Services, 2001)).

14 E. Panousos, “Development of a First Nations Off-Reserve Strategy: Issues for Discussions,” Presentation to the First Nations Centre Governing Committee, November 9, 2003, Calabogie, Ontario [unpublished, on file at the National Aboriginal Health Organization].

15 Yvonne Boyer, “Aboriginal Health: A Constitutional Rights Analysis” in *Discussion Paper Series No. 1, Aboriginal Health: Legal Issues* (Saskatoon: National Aboriginal Health Organization and the Native Law Centre of Canada, 2003) at 3.

16 Rotman, *supra* note 2 at 3.

17 The Supreme Court of Canada has voiced guiding principles on interpreting adequate and meaningful consultation. These guidelines are examined in Part Two.

18 Judith Bartlett & Richard Jock, *An Examination of Aboriginal Health Service Issues and Federal Aboriginal Health Policy*. A Presentation to the Standing Senate Committee on Social Affairs, Science and Technology, National Aboriginal Health Organization, May 30, 2001 [unpublished, on file at the National Aboriginal Health Organization] at 2.

- 19 See, for example, J.A. Smylie, “Guide for Health Professionals Working with Aboriginal Peoples: Health Issues Affecting Aboriginal Peoples” (2000) 23 *Journal of the Society of Obstetricians and Gynecologists of Canada* 54; First Nations and Inuit Regional Health Survey National Steering Committee, First Nations and Inuit Regional Health Survey National Steering Committee, *First Nations and Inuit Regional Health Survey, National Report* (Ottawa: NAHO, 1999); H.L. MacMillan, “AboriginalHealth” (1996) 155 (11) *C.M.A.J.* 1569.
- Further, it is well-documented that at contact the Europeans brought many diseases including tuberculosis, cholera, chickenpox, smallpox, diphtheria, pertussis (whooping cough), influenza, typhoid, venereal disease and poliomyelitis (G. Graham-Cumming, *Health of the Original Canadians, 1867 – 1967*, *Med. Ser. J. Can.* 23, 115-166 at 142 [Graham-Cumming].
- Graham-Cumming describes the European diseases:
- The European races, however, were heavily infected and had been for centuries. Chronic rather than acute cases were extremely common among them, persons not seriously incapacitated by the disease but still capable of actively spreading the infection. (*Ibid.* at 129)
- 20 M. Lux, *Medicine That Walks: Disease, Medicine, and Canadian Plains Native Peoples: 1880-1940* (Toronto: University of Toronto Press, 2001).
- 21 Canada, Royal Commission on Aboriginal People, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength* Vol. 3 (Ottawa: Supply and Services Canada, 1996) [RCAP], online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>.
- 22 Graham-Cumming, *supra* note 19 at 122. See also Waldram, *supra* note 9 at 122-123.
- 23 Waldram, *supra* note 9 at 150-151.
- 24 For a discussion of the Métis on the western prairies see, D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo: Wilfred Laurier University Press, 1988).
- 25 Lux, *supra* note 20 at 20.
- 26 Following the signing of the first numbered treaty in 1871 the federal government created the ‘Indian Agent’. The agents were used to implement the treaties and often worked in conjunction with physicians, missionaries and the police. The physicians conducted medical examinations, vaccinations and pulled teeth while the agent paid out treaty money. The ‘medicine chest’ clause represented the embodiment of medical services through the Indian agent. Waldram, *supra* note 9 at 154-155. See also Graham-Cumming, *supra* note 19 at 133.
- When a formal ‘Medical Branch’ was established within Indian Affairs, Col. E.L. Stone, the newly appointed Medical Superintendent, wrote of the branch’s position on Indian health:
- The Indian agent ... is responsible for every matter affecting the interests of the Indians under his charge, including ... the administration of the medical and health services (Waldram, *supra* note 9 at 159).
- 27 Lux, *supra* note 20 at 70, Graham-Cumming, *supra* note 19 at 133, Waldram *supra* note 9 at 155.
- 28 Lux, *ibid.* at 38.
- 29 Lux elaborates further on the devastating impacts of the “rations policy” and notes that Treaty Seven oral history states that the rations were intentionally poisoned. The Indian agent directed the Indians to “mix a yellow substance into the flour ...” The substance in the flour was believed to be sulfur. Bluestone and lye were allegedly found in the meat (bluestone is used as an insecticide or pesticide). “Belly sickness” was the term used for the distended abdomens resulting from eating these rations. The people who ate these rations died “so fast they did not have time to bury them; they just left their bodies on top of the ground.” This site is known as Ghost Coulee. A Blood Elder related the same story of mass poisoning due to contaminated rations. The Blood people who fell victim are buried at Belly Butte. (Lux, *supra* note 20 at 59-62).
- 30 Waldram, *supra* note 9 at 156.
- 31 Lux, *supra* note 20 at 5, Graham-Cumming *supra* note 19 at 123.
- 32 From 1845 to 1969 the Canadian government sought to assimilate Aboriginal people by giving their children a Christian education; teaching them English or French; and forcibly removing them from their homes, families, cultures, languages, and traditions. Officially, residential schools

operated in Canada from 1892 until 1969. At one time there were 88 schools operating in Canada. Although the Government of Canada officially withdrew in 1969, a few of the schools continued operating throughout the 1960s, 70s and 80s. Akaitcho Hall in Yellowknife did not close until the 1990s. These schools were run through a partnership between the federal government and the churches. The federal government paid for capital expenditures and salaries for the staff, and the churches had the responsibility for the school activities and daily operations. An estimated 100,000 to 150,000 First Nation, Métis and Inuit children attended residential schools. Thousands of former students have come forward to claim that physical, emotional, and sexual abuse were rampant in the school system and that little was ever done to stop it or to punish the abusers. (Assembly of First Nations, *Residential School Update* (Ottawa: Assembly of First Nations, 1998).

- 33 R.G. Ferguson, *Studies in Tuberculosis* (Toronto: University of Toronto Press, 1955) at 6 cited in Graham-Cumming *supra* note 19 at 134. By 1929 the Indian death rate in this area was 20 times greater than for the non-Aboriginal population (Graham-Cumming at 134).
- 34 Waldram, *supra* note 9 at 156.
- 35 P.H. Bryce, *The Story of a National Crime - Being a Record of the Health Conditions of the Indians of Canada from 1904-1921* (Ottawa: James Hope and Sons, 1922) cited in Lux, *supra* note 20 at 192.
- 36 Bryce, *ibid.* at 3.
- 37 Waldram, *supra* note 9 at 156-157 and 136.
- 38 *Ibid.* at 157.
- 39 *Ibid.* at 158.
- 40 Lux, *supra* note 20 at 201.
- 41 Waldram, *supra* note 9 at 160.
- 42 *Ibid.*
- 43 *Ibid.* at 159-160.
- 44 Lux, *supra* note 20 at 191.
- 45 Waldram, *supra* note 9 at 160-161.
- 46 Lux, *supra* note 20 at 224.
- 47 Waldram, *supra* note 9 at 175-176.
- 48 *Ibid.* at 174-175.
- 49 *Ibid.*
- 50 Under the provision of the Alberta *Metis Population Betterment Act* of 1938, Metis Settlements were established in the 1930s in response to recommendations contained in the 1932 Ewing Commission Report. Although twelve colonies were originally established, four of the colonies ceased to operate because the land was unsuitable for farming. Under the 1989 Alberta Metis Settlements Accord, and resulting 1990 legislation, the Settlements collectively acquired title to the Settlement areas and were established as corporate entities, similar to municipal corporations, with broad self-governing powers. Metis Settlements are comprised of eight distinct geographic areas in northern Alberta covering approximately 1.25 million acres with a total population of 6,500 in 1995. The Settlements are governed locally by elected 5-member councils and collectively by the Metis Settlements General Council. (Alberta, Department of Learning, "Aboriginal Studies Glossary" in *First Nations, Metis and Inuit Education Policy Framework* (Edmonton: Government of Alberta, 2004), online: <<http://www.learning.gov.ab.ca/nativeed/nativepolicy/Glossary.asp>>).
- 51 Waldram, *supra* note 9 at 165.
- 52 *Ibid.* at 169.
- 53 *Indian Act*, S.C. 1906, c.81. s.1 am. S.C. 1924, c.47, s.1.
- 54 *Indian Act*, S.C. 1932-33, c.42.
- 55 *Eskimos*, *supra* note 11.
- 56 Waldram, *supra* note 9 at 163-164.

- 57 *Ibid.* at 164.
- 58 Canada, Indian and Northern Affairs Canada, Health and Welfare, Communiqué 1979-88, “Statement on Indian Health Policy” (Ottawa: Canadian Government Publishing Directorate, September 19, 1979).
- 59 Canada, Health Canada, First Nations and Inuit Health Branch, *Ten Years of Health Transfer First Nation and Inuit Control* (Ottawa: Canadian Government Publishing Directorate, 1999), online: <http://www.hc-sc.gc.ca/fnihb/bpm/hfa/ten_years_health_transfer/>.
- 60 The \$150 million Health Transition Fund is a federally funded effort involving all levels of government, supporting projects across Canada to test and evaluate innovative ways to deliver health care services, including primary health care. Of the 517 funded projects, 22 are categorized as Aboriginal, and include areas such as home care, telehealth and primary care. Canada, Health Canada, *Health Transition Fund* (Ottawa: DIAND, 2002), online: <http://www.hc-sc.gc.ca/htf-fass/english/whatwedo_e.htm>. To date there has not been a significant investment in research to ascertain how health system models could reflect culturally sensitive, holistic practices combining the very best practices of Aboriginal traditional and western medicine and the locus of decision-making between health practitioners in these areas.
- 61 Canada, Indian and Northern Affairs, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government”, *Federal Policy Guide – Aboriginal Self Government* (Ottawa: 1995), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>.
- 62 See especially Part 1, *ibid.*, Policy Framework, “Scope of Negotiations”.
- 63 Canada, Health Canada, First Nations and Inuit Health Branch *Mandate and Priorities* (Ottawa: Canadian Government Publishing Directorate, 2001), online: <http://www.hc-sc.gc.ca/fnihb-dgspni/fnihb/mandate_priorities.htm>.
- 64 One of the earliest recorded cases is *Keech v. Sandford* (1726), 25 E.R. 223 (Ch.).
- 65 Rotman, *supra* note 2 at 151.
- 66 E. Weinrib, “The Fiduciary Obligation” (1975) 25 U.T.L.J. 1 at 4.
- 67 Rotman, *supra* note 2 at 180.
- 68 *Ibid.* at 181.
- 69 *Ibid.*
- 70 *Ibid.*
- 71 *Ibid.*
- 72 *Ibid.*
- 73 *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214. See also, *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, [2002] 1 C.N.L.R. 271; *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, [1998] 1 C.N.L.R. 134.
- 74 *Sui generis* is a Latin term meaning “of its own kind”, “unique or peculiar”. *Blacks Law Dictionary*, 7th ed., (St. Paul Mn.: West Group, 1999) s.v. “sui generis”. Rights that are *sui generis* do not fit into categories of French or English law (*R. v. Guerin*, *supra* note 1 cited in J. Woodward, *Native Law* (Toronto: Carswell, 2002) at 5-7).
- 75 Rotman, *supra* note 2.
- 76 *Guerin*, *supra* note 1 at 385, Dickson J. stated “in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.”
- 77 Rotman, *supra* note 2 at 14.
- 78 *Ibid.* at 4.
- 79 *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*]. See also, *Sparrow*, *infra* note 115 at 177, *Delgamuukw*, *infra* note 138 at para. 200 *per La Forest, J.* The legal rights deriving from the 1763 Proclamation are specifically guaranteed to Aboriginal Peoples in s.25 of the *Charter of Rights and Freedoms*, against all individuals:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement. (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.)

- 80 “Deed of the Beaver Hunting Ground,” E.B. O’Callaghan ed. *Documents Relative to the Colonial History of the State of New York*, vol. 9 (Albany: Weed, Parsons and Company, 1853-1887) at 908-910.
- 81 The M’kmaw district chiefs ratified the Wabanaki Compact in 1726 and 1749. These treaties were reaffirmed as part of the M’kmaw Compact in 1752. W.E. Daugherty, *Maritime Indian Treaties in Historical Perspective*. (Ottawa: INAC, Treaties and Historical Research Centre, 1983) at 84-85.
- 82 “Documents relating to the constitutional history of Canada, 1759–1791, Gage’s enclosure No. 38 March 20, 1762 in Amherst’s to Egremont of 12 May, 1762 A. & W. I.” vol. 97 Shortt, Adam, Doughty, Arthur G., eds. *Public Archives of Canada Historical Documents* (Ottawa: J. de L. Tache, 1918) at 128-129.
- 83 “Documents relating to the constitutional history of Canada, 1759–1791, Instructions to Governor James Murray from George R., 7 December 1763” vol. 97 Shortt, Adam, Doughty, Arthur G., eds. *Public Archives of Canada Historical Documents Publication Board* (Ottawa: J. de L. Tache, 1918) at 199.
- 84 *Ibid.* at 200.
- 85 Treaties and Historical Research Centre, *The Historical Development of the Indian Act* (2d ed.) (Ottawa: Indian and Northern Affairs, 1978) at 2.
- 86 *Ibid.*
- 87 *In Whom We Trust*, *supra* note 2 at 12.
- 88 *Royal Proclamation*, *supra* note 79.
- 89 *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, Ex Parte Indian Association of Alberta*, [1982] Q.B. 892, [1981] 4 C.N.L.R. 86 (Engl. C.A.) at 99.
- 90 *Ibid.*
- 91 *Ibid.*
- 92 *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145, 7 C.N.L.C. 91 at 150 [cited to C.N.L.C.] [Calder]. See also, Land, L. & Townshend, R. “Land Claims: Stuck in Never-never Land” in J. Bird, L. Land & M. MacAdam, eds. *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*. (Toronto: Irwin Publishing, 2001) 53 at 54 [*Nation to Nation*]. G. Erasmus and J. Sanders write that “[t]he Proclamation could be regarded as the first major legal link between First Nations and the British Crown.” (*Nation to Nation* at 6).
- 93 *Calder, ibid.*
- 94 *Guerin*, *supra* note 1 at 383.
- 95 *R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127 [*Sioui*].
- 96 *Ibid.* at 153.
- 97 This characterization dates back to a trilogy of American case law, particularly the 1831 case of *Cherokee Nation v. State of Georgia* where the United States Supreme Court stated that the Cherokee Nation’s relationship to the United States “resembles that of a ward to his guardian”. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).
- 98 Rotman, *supra* note 2 at 20.

- 99 *St. Catherine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577; aff'd (1888), 14 App. Cas. 46 (P.C.) in Waldram, *supra* note 9 at 20.
- 100 *Guerin*, *supra* note 1 at 379. In political trust cases, the party claiming to be a beneficiary under such a trust was dependent entirely upon statute, ordinance or foreign treaty as the basis for its claim to an interest in the funds in question. This distinction was recognized in two English cases dealing with the position of the Crown as trustee in other colonies: *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 (Ch.); *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619 (H.L.). In *Guerin*, *supra* note 1 at 371 the Court quoted Lord Selbourn L.C. in *Kinloch* case (pp. 625–26):
- Now the words “in trust for” are quite consistent with, and indeed are the proper manner of expressing, every species of trust – a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.
- 101 *Guerin*, *supra* note 1 at 376, Rotman, *supra* note 2 at 88.
- 102 *Guerin*, *ibid.* at 376.
- 103 *Ibid.* at 384.
- 104 *Ibid.* at 378-379.
- 105 *Ibid.* Rotman, *supra* note 2 at 110; B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 737-738 [Slattery, “Aboriginal Rights”] at 754; McNeil, *supra* note 2 at 316-317.
- 106 *Kruger v. R.* (1985), 17 D.L.R. (4th) 591, [1985] 3 C.N.L.R. 15 (F.C.A.).
- 107 McNeil, *supra* note 2 at 315. The Commissioners of the Aboriginal Justice Inquiry of Manitoba have also taken the position that the fiduciary obligation applies not only to the federal government, but is also a responsibility of the provincial Crowns:
- Our courts have established an entirely new approach toward the examination of aboriginal legal issues, which includes the fiduciary obligation, the content of Aboriginal title, and the scope of Aboriginal and treaty rights. This approach applies to all legislation, whether or not Aboriginal peoples or their unique legal rights are mentioned. The broad thrust of the law covers both federal and provincial legislation because both levels of government owe a fiduciary duty to all Indian, Inuit and Métis people. (Aboriginal Justice Inquiry of Manitoba. *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) at 160-161).
- 108 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, [1996] 2 C.N.L.R. 25 [*Blueberry River Indian Band*] at para. 115.
- 109 *R. v. Adams*, [1996] 3 S.C.R. 101, [1996] 4 C.N.L.R. 1 (S.C.C.) at para. 54.
- 110 *Constitution Act, 1982*, *supra* note 8 at s.35(1).
- 111 *Ibid.* at s.52(1).
- 112 Cheffins & Tucker, *The Constitutional Process in Canada* (2d ed., 1976) at 4 cited in P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 2002) at 1-1 [Hogg].
- 113 Hogg, *ibid.* at 1-1.
- 114 *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65 at 80.
- 115 *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 [*Sparrow*] cited to C.N.L.R.
- 116 See also, *Blueberry River Indian Band*, *supra* note 108.
- 117 *Rotman*, *supra* note 2 at 3.
- 118 *Sparrow*, *supra* note 115 at 180.

- 119 *Ibid.* at 180-81. See also, James Youngblood (Sákéj) Henderson; Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000) at 343. In *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] 4 C.N.L.R. 161 (S.C.C.) at para. 92, the Supreme Court repeated and affirmed the significance of the “honour of the Crown.” The strong statements in *Sparrow* at 181 and 187 and *Marshall* suggest that all government departments must show sensitivity and respect when dealing with Aboriginal rights. They suggest that all legislative action and policy that might infringe Aboriginal or treaty rights must meet the tests set out in *Sparrow*, such as the duty to consult.
- 120 *Sparrow*, *supra* note 115 at 181.
- 121 *Ibid.* The *Sparrow* justification test is described at 182-183.
- 122 *Ibid.* at 182. Infringement of such rights may be permissible provided the Crown is able to convince the court that such infringement is consistent with fiduciary obligations if the infringing legislation or regulation has a valid legislative objective that is both ‘compelling and substantial’ (like conservation of fish resources) to justify the infringement.
- 123 *Ibid.*
- 124 The Crown must establish that the infringement of the right in question “does not unduly restrict the Aboriginal right and can be accommodated with the fiduciary obligation the Crown owes to the Aboriginal Peoples.” (*Sparrow*, *ibid.* at 180).
- 125 *Ibid.* at 187.
- 126 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 146 [*Van der Peet*].
- 127 *Ibid.* at paras 23-25.
- 128 *Ibid.* at para. 28.
- 129 *R. v. Côté*, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26 at para. 74:
 The text and purpose of s.35(1) do not distinguish between federal and provincial laws which restrict aboriginal and treaty rights, and they should both be subject to the same standard of constitutional scrutiny.
 See also Lord Denning in *The Queen v. Secretary of State*, *supra* note 89 at 97:
 As a result of this important constitutional change, I am of [the] opinion that those obligations which were previously binding on the Crown simpliciter are now to be treated as divided. They are to be applied to the Dominion or Province or territory to which they relate, and confined to it.
 See also, *Gitanyow First Nation v. Canada* (1999), 66 B.C.L.R. (3d) 165, [1999] 3 C.N.L.R. 89 (B.C.S.C.), and *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 178 D.L.R. (4th) 666, [1999] 4 C.N.L.R. 1 (B.C.C.A.) [*Halfway River*].
- 130 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 542-543 and at 559. See also, *R. v. Van der Peet*, *supra* note 126 at para. 30.
- 131 *Calder*, *supra* note 92 at 103. See also *Roberts v. Canada*, [1989] 1 S.C.R. 322, [1989] 2 C.N.L.R. 146 at 156, where it was asserted that while Aboriginal title pre-dated colonization by the British and survived British claims of sovereignty, the Aboriginal right of occupation and possession continued only as a “burden on the radical or final title of the Sovereign.” How the Sovereign achieved sovereignty, in the absence of conquest or submission, was not discussed.
- 132 *Van der Peet*, *supra* note 126 at para. 30.
- 133 *The Wik Peoples v. Queensland* (1996), 187 C.L.R. 1 (H.C. Aus.) at para. 51.
- 134 A.W. B. Simpson, *A History of The Land Law* (2d ed.) (Oxford: Oxford University Press, 1986) at 107-108; R. E. Megarry & H. W. R. Wade, *The Law of Real Property* (5th ed.) (London: Stevens & Sons Limited, 1984) at 849-850.
- 135 *Van der Peet*, *supra* note 126 at para. 112.
- 136 Slattery, “Aboriginal Rights”, *supra* note 105, B. Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall L. J. at 681-703 [Slattery, “Sovereignty”]; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 110-16 and at 181-83 [McNeil, *Aboriginal Title*].

- 137 M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) [*Indigenous Knowledge*] at 212.
- 138 *Delgamuukw v. British Columbia*, 1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 at paras 133-34.
- 139 RCAP, *supra* note 22 at 348.
- 140 *Indigenous Knowledge*, *supra* note 137 at 212-215.
- 141 Waldrum, *supra* note 9 at 107.
- 142 *Ibid.* at 109.
- 143 *Ibid.* at 110.
- 144 *Indigenous Knowledge*, *supra* note 137 at 212–213.
- 145 Slattery, “Aboriginal Rights”, *supra* note 105 at 737-38; Slattery, “Sovereignty”, *supra* note 136 at 681-703; McNeil, *Aboriginal Title*, *supra* note 136 at 110-16 and at 181-83.
- 146 Specifically Treaty No. 6 states:
 That in the event hereafter of the Indians compromised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by thereof by Her Indian Agent or Agents, will grant to the Indian assistant of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them. (Treaty No. 6. “Between Her Majesty the Queen and the Plains and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River” (Ottawa: Queen’s Printer), reported by A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories, Including the Negotiations on Which They Were Based and Other Information Relating Thereto* (Toronto: Belfords Clarke, 1880) at 354 [Morris]. See also, Boyer, *supra* note 15 for a discussion on treaties.)
- 147 *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 2 C.N.L.R. 77 at para. 39.
- 148 *Guerin*, *supra* note 1 at 376 and at 382, 383.
- 149 Peter W. Hutchins, David Schulze and Carol Hilling, “When Do Fiduciary Obligations to Aboriginal People Arise?” (1995) 59 Sask. L. Rev. 97 at 135-136.
- 150 For example, between 1611 and 1760 there are seven specific references to contagious illnesses affecting Mi’kmaq communities and one reference to disease among the Wuastukwuik that are part of the treaty discussions, *see*, B. Witkin, “26 August, 1726: A Case Study in Mi’kmaq-New England Relations”, *Acadiensis*, XXIII, (Autumn 1993).
- 151 RCAP, *supra* note 21 at 113. Historical epidemiology remains largely a speculative science and is plagued by inconsistent debate. However most scholars and experts agree that European-introduced disease was a major factor in the catastrophic decline of Aboriginal Peoples in North America. The impact of infectious disease in Canada was equally disastrous. Given the scale of this catastrophe, most note that it was remarkable that Aboriginal Peoples survived. See Graham-Cumming, *supra* note 19.
- 152 The treaties provided farming reserves to ensure access to basic shelter, housing, sanitation, and farming; the prohibition of alcohol on the reserves to provide a healthy community; to provide education and access to information concerning health problems, including methods of preventing and controlling them; to sustain the existing livelihood of hunting, trapping and fishing to ensure access to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger: Morris, *supra* note 146 at 354. (Treaty Commissioner Morris in his writing on the Victorian treaties attests that the Indians were concerned in the treaty negotiations that “they would be swept off by disease or famine – already they have suffered terribly from the ravages of measles, scarlet fever and small-pox”. Morris stated, “I come to you, ... to try to help you”, *ibid.* at 185 and 201.)
- 153 Canada, Department of National Health and Welfare, 1958. *Annual Report, 1957* Ottawa: Queen’s Printer at 76. See also Treaty No. 6. The treaties are reproduced in R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica, 1995) at Part III.

- 154 Sákéj Youngblood Henderson reflects: “There has been no documented case where the two departments have ever agreed to a joint process to address the treaty right to health issue.” (J.Y. Henderson, “Treaty Rights to Health” (2002) [unpublished, Native Law Centre, University of Saskatchewan]).
- 155 Canada, Department of National Health and Welfare, 1965 *Annual Report, 1964* (Ottawa: Queen’s Printer) at 95.
- 156 Canada, Department of National Health and Welfare, 1971 *Annual Report, 1971* (Ottawa: Queen’s Printer) at 105.
- 157 Romanow, *supra* note 6 at 212.
- 158 For a discussion on prepaid health benefits see, Henderson, *supra* note 154 and Everett R. Rhoades et al., “Health on the Reservations”, in Encyclopedia Britannica Inc., 1994 *Medical and Health Annual*, 96-119:
 To the extent that the government has provided health services for Indians in conjunction with the treaties in which land was ceded, Indian health care represents a prepaid health plan – quite likely the first example of such a concept.
 In his Special Message to the Congress on Indian Affairs, President Nixon stated:
 [T]he Indians have often surrendered claims to vast tracks of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans (President Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), online: <http://www.nixonfoundation.org/Research_Center/1970_pdf_files/1970_0213.pdf>).
- See also, A. Bergman et al., *A Political History of the Indian Health Service* (Seattle: Harbourview Medical Centre, 1993), online: <<http://www.sihb.org/ihs27.html>>:
 Nixon’s Indian policy statement turned Federal/Indian relations on its head. At one fell swoop a colonial system was brought into the modern world. His concept of a business deal, i.e. land from the Indians in exchange for federal services, gave credibility to our position that the tribes had purchased a prepaid health care plan in perpetuity. [Prepaid]
- 159 *Haida Nation v. B.C. and Weyerhaeuser* (2002), 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121 at paras. 33–36 (C.A.); additional reasons, (2002), 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117 (C.A.) [*Haida Nation*].
- 160 See for example, K. McNeil, “Section 91(24) Powers, the Inherent Right of Self Government, and Canada’s Fiduciary Obligations” (Paper presented to the Canadian Aboriginal Law Conference, Vancouver: Pacific Business and Law Institute, December, 2002) [McNeil, “Section 91(24)”] at 21. See also, Canada, Indian and Northern Affairs, “Communities First: First Nations Governance” *First Nations Governance Act* (7 October, 2003), online: Indian and Northern Affairs Canada <http://www.fng-gpn.gc.ca/FNGA_e.html#bill>.
- 161 The Natural Health Product Directorate of Health Canada was established in 1999 in direct response to the House of Commons Standing Committee on Health Recommendations. (James LaMouche, NAHO Briefing Note 042/02, *Natural Health Products Directorate (NHPD) Aboriginal Roundtable* (2002) [unpublished, on file at NAHO].) See also Health Canada’s proposal to consolidate existing health protection legislation by replacing certain acts with the New Canada Health Protection Act (Canada, Health Canada, *Health Protection Legislative Renewal* (Ottawa: Health Canada, 2004), online: <<http://renewal.hc-sc.gc.ca>>. Two areas of great concern to Aboriginal people are the regulation of natural health products and the regulation of information including the authority to collect, use and disclose information. Health Canada has hosted two information sessions, one specifically with the Assembly of First Nations in March 2004 hosted by NAHO. (First Nations Centre, NAHO Briefing Note FNC04-045 *Federal Proposal for a New Health Protection Act* (Ottawa: NAHO, 2004), online: <http://www.naho.ca/firstnations/english/pdf/FNC04-045_health_protection.pdf>.)

- 162 *Delgamuukw supra* note 138 at para. 168.
- 163 *Sparrow, supra* note 115 at 181 and at 187, *Haida Nation, supra* note 159.
- 164 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169 at para. 95 (F.C.T.D.) [*Mikisew Cree*].
- 165 *Halfway River supra* note 129 held that British Columbia Ministry of Forests, did not adequately discharge their obligations of meaningful and adequate consultation.
- 166 See especially Justice Hansen in *Mikisew Cree, supra* note 164 at para. 156.
- 167 *Ibid.* at para. 156. The fact that the *Mikisew Cree* did not participate in a public consultation process was described as “not constitut[ing] First Nations consultation as required [by] s.35(1) of the *Constitution Act, 1982*.” In *Halfway River, supra* note 129 at para. 49, it was noted that the Crown provided fourteen letters to the First Nation, held three meetings, held five telephone calls and gave the First Nation an opportunity to provide feedback. The Court found that there was not adequate consultation because the First Nation was not invited to attend the meeting where the permit was approved, was not provided with the report on the impacts until close to the approval date, did not provide the First Nation an opportunity to participate in the Assessment and did not provide the First Nation with the permit application until the permit was issued. The Court found that in general that information was not provided on a timely basis.
- 168 *Gitksan First Nation v. British Columbia (Minister of Forests)* (2002), 10 B.C.C.R. (4th) 126, [2003] 2 C.N.L.R. 142 at para. 89. In terms of consultation – *Delgamuukw* refers to the importance, at minimum, of consultation and notes that it will generally “be significantly deeper than mere consultation” (at para. 168) and *Mikisew Cree, supra* note 164 at para. 153. According to Kent McNeil, the process that the federal government followed when attempting to implement the *First Nations Governance Act* may have been found to be inadequate to fulfill the duty of the Crown to consult with the holders of the right. For instance the “Backgrounder” accompanying the Act states the Crown consulted with “[m]ore than 10,000 individuals and leaders” Case law has established that the duty of consultation must address the actual holders of the right as collectives. The Backgrounder does not indicate whose individual views were expressed. Case law is clear that consultation with people in general cannot justify an infringement (or potential infringement) of an Aboriginal right. (McNeil, “Section 91(24)” *supra* note 160 at 21).
- 169 *Mikisew Cree, supra* note 164 at para.156.
- 170 *Haida Nation, supra* note 159 at paras 100, 101. In the *Haida Nation* case, the B.C.C.A. was of the opinion that not only did the Crown owe a fiduciary obligation to consult with First Nations but that such an obligation was also owed by private corporations.
- 171 *Halfway River, supra* note 129 at para. 160.
- 172 *Delgamuukw, supra* note 138 at para. 168.
- 173 *Ibid.*
- 174 *Halfway River, supra* note 129 at para. 160. See also Foster et al , Government of Canada, “Report 21– Access to Information Review Task Force, Selected Concerns of Aboriginal Peoples” *Unique Legal and Constitutional Position of Aboriginal Peoples*, (2002), online: <<http://www.atirtf-geai.gc.ca/paper-aboriginal1-e.html>> for a discussion on disclosure of information.
- 175 *Ibid.* at para. 82.
- 176 *R. v. Noel*, [1995] 4 C.N.L.R. 78 at 93 (N.W.T.T.C.).
- 177 *Haida Nation, supra* note 159 at para. 64.
- 178 *Ibid.* at para. 76. However, in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, [2000] 3 C.N.L.R. 153) the Ontario Court of Appeal held that it was only after a First Nation had established an infringement of an existing Aboriginal or treaty right, through an appropriate hearing, that the duty of the Crown to consult with First Nations was a factor for the court to consider in the justificatory phase of the proceeding.
- 179 *Haida Nation, supra* note 159. In this decision, the issue of the duty to consult arose in the context of a number of replacement tree farm licenses issued by the Minister of Forests under

section 29 (now section 36) of the *Forest Act*. The Haida Nation challenged the replacement licenses issued by the provincial Minister to MacMillan Bloedel in 1981, 1995 and 2000 and the subsequent transfer of one of these licenses from MacMillan Bloedel to Weyerhaeuser Company Limited in 2000. Counsel in the *Haida Nation* case sought to distinguish the decision in *Taku River Tlingit First Nation v. Ringstad et al.* (2002), 98 B.C.L.R. (3d) 16, [2002] 2 C.N.L.R. 312 (C.A.) [*Taku River*] on the basis that there was no statutory requirement for consultation on the facts in the *Haida Nation* case. The B.C.C.A., however, found that the Crown had a constitutional obligation to consult with Aboriginal Peoples asserting title and rights as a component of the ‘accommodation process’ referred to by Chief Justice Lamer in *Delgamuukw*. The B.C.C.A. also was of the opinion that this obligation extended to both cultural and economic interests. As in the *Taku River* case, the B.C.C.A. found that the obligation to consult arose even in the absence of a court decision establishing the existence and scope of those rights. See, Louise M. Mandell, “New Law on Consultation – The Impact of the British Columbia Court of Appeal – Reconsideration of Haida and the Taku River Tlingit Decisions” (Paper presented to the Canadian Aboriginal Law Conference, Vancouver: Pacific Business and Law Institute, December 2002) [Mandell].

- 180 *Taku River*, *supra* note 179. The issue of a duty to consult arose in the context of a Project Approval Certificate issued to Redfern Resources Ltd. by the Ministers of the Provincial Crown under section 30 of the *Environmental Assessment Act*. Redfern sought to build an access road to the mine that could be used to haul ore from the Tulsequah Chief Mine to Atlin in northern British Columbia. The proposed road would cross a portion of traditional territory of the Tlingit First Nation. The area in question was not the subject of a treaty but was the subject of treaty negotiations between the Tlingit First Nation, the federal government and the provincial government of British Columbia. The Tlingit First Nation had asserted but not yet proven Aboriginal rights or title to the land in question. The trial judge found that the provincial Ministers were under both a fiduciary duty and a constitutional duty (under s.35 of the *Constitution Act, 1982*) to consult the Tlingit First Nation before issuing the Project Approval Certificate. The trial judge found that the Ministers did not fulfil the obligation to meaningfully consult with members of the Tlingit First Nation in the final stages of the environmental review process. A provision of this legislation provided for consultation with First Nations. See also Mandell, *supra* note 179.
- 181 Romanow, *supra* note 6 at 212. See also, Canada, Auditor General, *Report of the Auditor General* (Ottawa: 1997) at Chapter 13, and Canada, Auditor General, *Report of the Auditor General* (Ottawa: 2000) at Chapter 15. The five underlying reasons for the disconnect were noted to be i) competing constitutional assumptions; ii) fragmented funding for health services; iii) inadequate access to health care services; iv) poorer health outcomes; and v) different cultural and political influences.
- 182 Statement by the Prime Minister of Canada, The Right Honourable Pierre Elliott Trudeau, to the Conference of First Ministers on Aboriginal Constitutional Matters, 8-9 March 1984, in M. Boldt, J.L. Long, L. Little Bear, *The Quest for Justice Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 148.
- 183 *Ibid.*
- 184 *Ibid.* at 153-154.
- 185 *Ibid.* 160-63.
- 186 Romanow, *supra* note 6 at 212.
- 187 *Ibid.*
- 188 Boyer, *supra* note 15 at 14.
- 189 Boyer, *ibid.* at 7.
- 190 *Constitution Act, 1982*, *supra* note 8.
- 191 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, [1990] 3 C.N.L.R. 46 at para. 105.
- 192 Prepaid, *supra* note 158.

- 193 Romanow, *supra* note 6.
- 194 Rotman, *supra*, note 2 at 180.
- 195 As McNeil, notes, “[h]ow any infringement of Aboriginal rights can accommodate the Crown’s fiduciary duty is somewhat of a puzzle, as it seems to violate the basic principle that a fiduciary is bound to act in the best interests of the person(s) to whom the duty is owed” (McNeil, *supra* note 2 at 319).
- 196 *Handbook*, *supra* note 4.
- 197 Justice, *supra* note 3 at 13.
- 198 Rotman, *supra* note 2 at 4.
- 199 Concerning the significance of discretionary power as an essential characteristic of a fiduciary relationship, see the decision of Madam Justice McLachlin of the Supreme Court of Canada in *Blueberry River Indian Band*, *supra* note 108. See J. Hurley, “The Crown’s Fiduciary Duty and Indian Title: *Guerin v. The Queen*” (1985) 30 McGill L.J. 559 at 594; *Desjarlais v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 2 C.N.L.R. 62 (F.C.T.D.). See also, *In Whom We Trust*, *supra* note 2 at 117 for a brief discussion on fiduciary discretion.
- 200 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
- 201 See for instance, L. I. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility” (1994) 32 Osgoode Hall L.R. 735.
- 202 *Sparrow*, *supra* note 115 at 177.
- 203 *Ibid.* at 176.
- 204 *Handbook*, *supra* note 4.
- 205 “Treaty Rights to Health”, *supra* note 154.
- 206 *Ibid.*

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